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ABSTRACT

A study sought to explain why unions fail to obtain contracts 25-30 percent of the time, even after winning the right to negotiate contracts in secret ballot elections. Data were collected from union representatives and National Labor Relations Board (NLRB) records pertaining to a sample of 135 Indiana cases and a sample of 140 cases nationwide where unions had won the right to negotiate during 1979-80. Because the national sample exclusively involved unions affiliated with the AFL-CIO, the data were biased in that they reflected the experience of larger unions rather than that of smaller, independent unions and the International Brotherhood of Teamsters. Unions were found to be more likely to obtain contracts under the following conditions: (1) when they were negotiating contracts with firms that had high wages relative to the firm's industry; (2) when they were negotiating contracts with firms in which separate bargaining units were already under contract with the union; (3) when the percentage of workers voting for union representation was higher and the size of the work unit was larger; and (4) when national union representatives were involved in the negotiations. The unions were less likely to obtain contracts in southern states with right-to-work laws, when the national union required national approval of local first-contract agreements, when the National Labor Relations Board had to resolve employer objections and/or challenges to union election victories, when employers refused to bargain, and when there were discriminatory charges and other forms of illegal discrimination against union activists. (Includes the questionnaires and 27 references.) (CML)

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# UNION ORGANIZING AND PUBLIC POLICY

## Failure to Secure First Contracts

William N. Cooke

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To my favorite critics: Anne, Benjamin, and Jayna.

# Foreword

The National Labor Relations Act was passed by Congress 50 years ago with the broadly stated objective of protecting the right of workers to seek union representation and to bargain collectively with employers. There is reason to contend that this objective has not been fully realized. As reported by the author of this study, workers fail to negotiate contracts after winning representation elections 25 to 30 percent of the time.

Evidence indicates that employer resistance to good faith bargaining plays a significant role in the failure to secure first contracts. William Cooke has developed and tested hypotheses concerning the impact of NLRB procedural delays, discriminatory discharges, and other salient factors on whether first contracts are negotiated. Drawing from his findings, he proposes policy and procedural changes designed to (1) halt discriminatory discharges preceding certification elections and during first-contract negotiations and (2) expedite NLRB case handling of objections and challenges and employers' refusals to bargain.

Facts and observations expressed in this study are the sole responsibility of the author. His viewpoints do not necessarily represent positions of the W. E. Upjohn Institute for Employment Research.

Robert G. Spiegelman
*Director*

*March 1985*

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# Executive Summary

The objective of this study has been to investigate the factors that explain why 25-30 percent of the time unions fail to obtain contracts after winning the right to negotiate contracts in secret ballot representation elections. Several of these factors have major implications for public policy as they are tied to labor relations law and its application to union organizing. In order to fully understand the workings of the law and the implications of our findings upon appropriate public policy reform, we begin with an historical overview of American labor law and a detailed examination of the policies, practices, and experiences of the National Labor Relations Board (NLRB) which regulates labor-management relations and union organizing in the private sector. We then describe our research design and findings of an investigation of the factors that impact upon the likelihood that unions obtain or fail to obtain first contracts. Finally, we draw upon our findings and knowledge of the law to prescribe changes in public policy to better effectuate the purposes of the National Labor Relations Act (NLRA).

It was found that 23 percent of a sample of unions in Indiana and 28 percent in a nationwide sample failed to obtain first contracts after winning certification elections in 1979 and 1980. The statistically significant findings can be summarized as follows:

- Unions negotiating with firms having relatively high wages vis-a-vis the firm's industry were more likely to obtain first contracts.

- Unions negotiating contracts with firms in which separate bargaining units were already under contract with the union were more likely to obtain first contracts.
- In southern states with state right-to-work laws, unions were less likely to obtain contracts than in other states.
- Where the percent of workers voting for union representation was higher and the size of the work unit was larger, unions were more successful in obtaining agreements.
- In those negotiations in which national union representatives were involved in negotiations, unions were more successful in reaching agreements.
- Where the national union required national approval of local first-contract agreements, unions were less successful in obtaining agreements.
- The delay associated with NLRB resolution of employer objections and/or challenges to union election victories sharply reduced the chances of unions obtaining first contracts.
- Employer refusals to bargain substantially reduced the chances of unions obtaining first contracts.
- Discriminatory discharges and other forms of illegal discrimination against union activists have a dramatic negative impact on the likelihood that unions obtain contracts.

It is the latter three findings that demonstrate the need for labor law reform. The three key areas of recommended public policy changes stem from our need to expedite NLRB proceedings, to block discriminatory discharges of union activists, and induce recalcitrant employers to negotiate in good faith. In short, the evidence shows that those groups of workers who need union representation the most in order to

countervail harsh employer treatment are more likely than others to be denied that representation.

Toward expediting NLRB case handling, several proposals in the Labor Reform Bill of 1977 are first evaluated. Dismissed are the proposals that would (1) allow the Board to make summary judgments of uncontested ALJ recommendations and (2) make Board orders not appealed within 30 days automatically enforced by the appellate courts. These proposals are dismissed on the grounds that employers who primarily seek to forestall their duty to bargain would invariably, through legal maneuvering, frustrate the best intentions of these reforms.

The proposal to enlarge the Board to seven members with seven-year appointments (while continuing to rely on three-member panels for much of the decisionmaking) has the best chance of the three reform bill provisions to expedite NLRB case handling. Here at least the speeding up of the process is dependent upon the efficient management of a larger Board and not upon the imagination of defendants to circumvent new case handling procedures.

Based on the finding of a large negative impact of the delayed resolution of employer objections and challenges upon first-contract negotiation outcomes, it is recommended that objections and challenges be subject to court review just as are unfair labor practice (ULP) complaints. This would obviate the need to reroute the resolution of employer objections and challenges through the technical refusal-to-bargain ULP complaint procedure. Those employers who want appellate court review of NLRB decisions would not be denied that review but at the same time would not be able to forestall their duty to bargain the additional months it now takes under the current resolution scheme.

An alternative policy would be to amend the NLRA to make it explicit that NLRB decisions regarding objections and challenges are not reviewable by the courts. Here we

would eliminate any right of employers to technically refuse to bargain. This alternative would eliminate the long delays typically associated with circuit court decisionmaking.

One provision of the Labor Reform Bill required the Board to establish guidelines for providing make-whole remedies to entire work groups who were denied the benefit of union contracts during periods when employers refused to bargain in good faith. The purpose of providing make-whole remedies is to deter employers from bargaining in bad faith since if they did, they would still be compelled to retroactively compensate work units. The fundamental flaw in the proposal stems from the underlying assumption that unions ultimately obtain first contracts. That is shown here to be a spurious assumption. Unless we are willing to dictate improved terms and conditions of employment for work units who never come under contract, the make-whole remedy can be seen as an additional incentive to employers to deny first contracts altogether. Hence, it is recommended that the make-whole proposal be dropped from the labor law reform agenda.

Finally, proposals to deter the flow of discriminatory discharges of union activists are evaluated. Two proposals were developed in the Labor Reform Bill to deter employers from such illegal behavior. The first proposal was to increase the size of the present back pay award (i.e., lost earnings with mitigation). As a means of deterring illegal discharges, and, in turn, improving the chances of unions to obtain first contracts, even double back pay (without mitigation) would fail to yield a sufficient deterrent. The problem with the proposal is twofold. Double back pay awards without mitigation would be insufficiently costly in most circumstances to offset the perceived long-run "gain" to many employers (i.e., keeping unions out of the workplace). The fact is that the price to the employer of a few well placed discharges is quite modest at best. An additional problem with this proposal is that unless the discharged employees are reinstated

and the employer's vindictive behavior thus rebuffed, larger back pay awards would not reduce the implied threat of further employer reprisals.

The heart of the problem is the necessity for quick reinstatement. A second proposal in the Labor Reform Bill would compel the Board, under the automatic injunction provision of the NLRA [section 10(l)], to seek injunctions in discriminatory discharge cases. Of all the recommendations to thwart that minority of employers who stoop to discriminatory discharges in order to bust union organizing efforts, this recommendation holds the greatest promise. However, we must modify the proposal to insure that a successful deterrent is developed. Besides the assurance of reinstatement, timeliness of reinstatement remains important. Even 10(l) injunctive relief takes considerable time. It is estimated that it would take an average of 55 days from the date of discharge to secure a 10(l) injunction. This delay is likely to be sufficiently short in the case of first-contract negotiations, which typically take several months to obtain from employers who do bargain in good faith. But the 55-day delay is far too long in the case of winning representation rights in the first place. Employers can time discharges just prior to election day, insuring that key union activists are out of the way during crucial campaign periods. To thwart this practice, the NLRB must establish a policy that elections lost by unions (where discharges have taken place) will be automatically rerun, or in the more flagrant cases of campaigns involving illegal discharges, employers will simply be ordered to recognize and bargain with unions. Before elections are rerun the discharged employees will be reinstated—a clear rebuff to the employer and a clear signal to other workers that the law will indeed protect them. By making certain that discharged employees be reinstated reasonably quickly and that lost elections accompanied by illegal discharges would automatically result in rerun elections, the deterrent effect of 10(l) injunctions should come to light. Employers will simply have more to lose by

discriminatorily discharging employees than from campaigning and negotiating fairly. The expected outcome, therefore, would be a sharp drop in discriminatory discharges. Hence, the greatest concern of the opponents of utilizing 10(l) injunctions (i.e., that the NLRB regional staff and district courts would be overwhelmed by a large and growing case load) would be circumvented.

It is worth noting that none of the present recommendations directly impede employers from surface bargaining or "going through the motions" during first-contract negotiations. The present recommendations, on the other hand, are expected to have a considerable indirect effect upon forcing recalcitrant employers to bargain in good faith. By expediting NLRB case handling and insuring that discrimination against union activists is halted, it is believed that union strength in negotiating first contracts will be enhanced substantially. It will be this enhanced bargaining power upon which unions will necessarily have to rely to economically force recalcitrant employers to fulfill their legal duty to bargain in good faith over first contracts.

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# Chapter 1

# Evolution of the National Labor Relations Act

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It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

*National Labor Relations Act, 1935*

As stated above, the National Labor Relations Act was passed in 1935 in order to protect workers' civil liberties with regard to the right to seek union representation and to bargain collectively with employers. Although these rights were not to be fully sanctioned by the law until the Supreme Court ruled on the Act's constitutionality in 1937, passage of the Act was a permanent and radical departure from American labor law history.

This report comes nearly 50 years after passage of the National Labor Relations Act (NLRA) but, as reported herein, much of the intent embodied in the Act is presently being frustrated and to no small degree. The focus of this study is upon investigating why 25-30 percent of the time workers, after exercising their rights under secret ballot to be represented by unions, fail to negotiate contracts with employers. As will be fully documented herein, NLRB case

handling delays, discriminatory discharges of union activists, and employer refusals to bargain are major impediments circumventing the "protected" rights of workers to union representation.

Chapter 1 provides a brief historical overview of American federal labor law. Although our history of union-management relations has been marked by considerable conflict—including the loss of lives and destruction of private property—chapter 1 does not focus on these tribulations. Instead, its purpose is to trace the legal antecedents and lay out the framework of our present labor law. Chapter 2 reviews the workings of the National Labor Relations Board (NLRB), which is the federal agency charged with interpreting and applying the NLRA. The chapter's primary focus is upon the policies and administrative procedures of the NLRB in protecting the rights of workers to bargain collectively once they have gained those rights through secret ballot voting. These first two chapters are written to provide essential background material for chapters 3 and 4. Chapter 3 presents an investigation and analysis of the factors that help explain the dismal failure of unions (in general) to obtain first contracts after winning the right to negotiate those contracts. Based on these findings, various public policy recommendations to better safeguard the legislated rights of workers to bargain collectively are discussed and evaluated in chapter 4. Finally, chapter 5 briefly summarizes the key points, findings, and recommendations of the study.

## A Period of Judicial Hostility

Before describing the purposes behind and enactment of the NLRA in 1935 and its amendments in 1947 and 1959, let us take a brief look at the legal history of labor relations in early America. The story begins with union organizing efforts in the early 1800s. The most celebrated case and the one that set the early tone for union organizing and collective

bargaining was the 1806 Philadelphia Cordwainers Case. Cordwainers (better known as shoe and bootmakers) in Philadelphia initially organized a guild of journeymen, the purpose being to insure quality products. Later, however, with a rapid extension of product markets and increasing competition, the journeymen were motivated to maintain their earning power. In their efforts to raise wages and secure "closed" shop agreements (i.e., every worker must be a union member), the shoemakers found themselves in court. The 1806 case led the Philadelphia court to find the union to be nothing less than a form of criminal conspiracy. The conspiracy doctrine was based on several governing principles of English common law, including:

- Unions interfere with the *freedom of contract* and *property rights* of both individual workers and employers.
- Unions have monopoly power and are thus *disruptive to both market competition and to the political system.*

The so-called conspiracy doctrine took hold in the various courts of early America and workers were largely deterred from even forming unions (see Wellington, 1968, pp. 7-26).

Not until the early 1840s did the conspiracy doctrine begin to give way. In the landmark case of Commonwealth v. Hunt, a Massachusetts Supreme Court judge decided a case where a union of shoemakers refused to work for their employer unless the employer fired a "scab" (i.e., a non-union worker). Judge Shaw reasoned that the court must be a neutral umpire in deciding union organizing and collective bargaining rights. To find a union unlawful under the conspiracy doctrine, Judge Shaw held, the courts must find the objectives and/or activities of a union unlawful. In and of themselves, unions were not unlawful.

Shaw's decision, however, does not appear to have had all that much influence upon restricting the courts' use of the conspiracy doctrine—only the focus had shifted. Employers turned to the courts to block specific union activity—strikes,

pickets, and boycotts. The courts after 1842 acted much like my landlady who, concerned primarily about the interests of her other tenants, agreed to let me have a piano in my apartment—as long as I did not play it!

The conspiracy doctrine began to wane in the late 1800s, but was replaced by court injunctions. There appeared to be little consistency in the judicial justifications for enjoining union activity, but the evidence suggests that injunctions were very easy to obtain, often without hearing the unions' side.

> After the criminal sanction had been replaced by the injunction, the courts had continued to act far beyond their range of competency; adjudicating without standards, without principles, and without restraint. . . . The abuse, moreover, extended to the procedures the courts employed and the decrees they issued as well as to the substantive law they developed. . . . Standards of fair procedure and experience with equitable remedies existed, but were simply disregarded. (Wellington, 1968, p. 39)

An important development in federal law in 1890 was unanticipated. The Sherman Antitrust Act was passed by the U.S. Congress, ostensibly to impede the monopolistic appetite of industrial conglomerates. Ironically, employers were able to utilize this piece of legislation against unions who, it was reasoned, had monopolistic characteristics intended to restrain competition and disrupt interstate commerce. It is of interest to note that disruption to commerce and competition was one of the principles underlying the criminal conspiracy doctrine. It is also important to underscore here that judges for the first time based their decisions upon interpretation of federal legislation, albeit their perverse interpretation of the law probably would not have arisen without widespread judicial hostility toward unionization.

The history of the application of the Antitrust Act to union activities was most interesting. Case after case, both lower courts and the U.S. Supreme Court found unions in violation of the law—typically in cases where unions embarked upon boycotts. It was not until 1908, however, that the Supreme Court explicitly ruled that the Sherman Antitrust Act was applicable to union organizing. Here, the United Hatters of North America, in an organizing drive, engaged in a nationwide boycott against Loewe and Company of Danbury, Connecticut. The Court decided the Hatters violated the antitrust law in "that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts in that regard, the liberty of a trader to engage in business."[1]

Shortly after the Danbury Hatters case, the U.S. Congress passed the Clayton Act. Unions first billed this act as a major victory as it was believed to have exempted unions from antitrust prosecution. The act stated that neither labor organizations nor their members could "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." The president of the American Federation of Labor, Samuel Gompers, declared the Clayton Act (Section 6) as the "Industrial Magna Charta upon which the working people will rear their construction of industrial freedom." (Witte, 1932, p. 68) It soon became clear, however, that the act only stated that unions, in and of themselves, were not illegal—something the courts had generally recognized after Commonwealth v. Hunt in 1842.

An important Court decision in 1921 laid to rest any question of the value of the Clayton Act to union organizing. In the Duplex decision of the U.S. Supreme Court, the Court ruled against the International Association of Machinists (IAM). The IAM, in seeking union recognition and bargaining rights, had pressed boycotts against the products of Duplex Printing Company of Battle Creek, Michigan. The

high Court ruled that the boycott was illegal under the Sherman Antitrust Act.[2]

Throughout the 1920s, the lower courts (and even the Supreme Court) frequently used the Sherman Antitrust Act to enjoin union organizing activity. Furthermore, prior to 1921 the federal courts restricted the application of the antitrust law against boycotts in general and against strikes in the railroad industry, but after 1921 they widened the application to include ordinary strike activity undertaken in all kinds of industries.

Another popular ploy of employers during the late 1800s and early 1900s was to have employees sign individual contracts of employment prohibiting them from joining or acting in behalf of unions. These contracts were dubbed by union organizers as "yellow-dog" contracts. Under the pretense of freedom-of-contract principles (one of the principles underpinning the criminal conspiracy doctrine), employers would use the contracts as effective deterrents to union organizing. When union organizers attempted to organize an employer's workforce, the employer would seek an injunction against the organizers. Union organizers, it was argued before the courts, were attempting to cause employees to "breech" their private contracts with the employer.

In spite of the fact that several states passed laws and the U.S. Congress passed the Erdman Act in 1898 that forbade employers in the railroad industry from executing yellow-dog contracts, their use became quite widespread—especially after the Supreme Court ruled in 1908 that such contracts were legal.[3] Here, the United Mine Workers (UMW) attempted to organize the workers of Hitchman Coal and Coke Company in West Virginia. Aware that the Hitchman employees had signed yellow-dog contracts as a condition of employment, the UMW organizers attempted to get workers to "agree" to union representation, but not actually join the union per se. The union's strategy was to convince a majori-

ty of workers to agree to union representation and subsequently call a strike for recognition. The Court ruled, however, that the union was still attempting to convince workers to breech contracts, which the majority of the Court believed workers entered into on a "voluntary" basis.

> What this meant to collective bargaining and unionization was indeed profound. Faced with an organization campaign, the employer made the execution of the yellow-dog contract a condition of employment. In periods of less than full employment, workers would be economically coerced into the agreement. The employer then applied for an injunction restraining any person who might encourage workers to join a union. Any disobedience to the injunction was punishable as contempt of court. (Taylor and Witney, 1983, p. 45)

Injunctions against union organizing and collective bargaining activity had become so widespread in the early 1900s that the period has generally been characterized as "government by injunction." Our brief review of the era of injunctions, however, would not be complete without referencing the historic "Debs" case. In that case, the American Railway Union in 1894 induced a series of strikes against the railroads. The Union was attempting to force the Pullman Car Company to reinstate a number of discharged union leaders and to negotiate over Pullman's cut in wages. A lower court enjoined the union and shortly after imprisoned its president, Eugene Debs, for violating the terms of that injunction. The U.S. Supreme Court, upon hearing the union's appeal, decided that the use of injunctions was constitutional.[4] Coupled with the blessing of the Court, the national publicity surrounding the strikes invariably popularized the use of injunctions by employers seeking to block union organizing and impede union power in collective bargaining.

## Antecedents to the NLRA

Except for a brief period during World War I when President Wilson got a pledge from both labor and industry leaders to avoid strikes and established the War Labor Board to help resolve labor disputes, it was not until 1926 that the federal government successfully intervened to promote industrial peace, support collective bargaining, and protect workers' rights to organize. That government initiative was embodied in the Railway Labor Act of 1926. The Act, albeit limited to the railroads, stands as a major precursor to and model for the NLRA that followed in 1935. Congress, in enacting the Railway Labor Act, sought labor-management peace in the railroad industry. The assumption was that the process of collective bargaining could bring that peace and that procedures for mediation and arbitration of disputes could facilitate any necessary resolution of disputes. Of greater interest to our present inquiry, the framers of the 1926 Act presumed that nonunionized workers would elect representatives for collective bargaining. It had become apparent that many carriers had established "company unions" to "represent" the interests of the workers. But these company unions were effectively controlled or dominated by company officials. They had no affiliation with union organizations outside of the company and the company restricted negotiable issues. The legitimacy of the company union practices under the Railway Act was soon tested in the courts. The Brotherhood of Railroad Clerks charged that the Texas & New Orleans Railroad had violated the new law because it would not recognize and bargain with them. Instead, the railroad had established its own company union, the "Association of Clerical Employees - Southern Pacific Line." Upon reaching the high court in 1930, to the surprise of many, the Court ordered the railroad to cease its interference with the right of workers to select their own union representatives.[1] The Court, therefore, also upheld the constitutionality of the Railway Labor Act. And although the law was thwarted by continued use of company

dominated unions until further amended in 1934, the Supreme Court's decision was a historic moment in labor relations law. For the first time, the Court had recognized the right of the federal government to enact legislation intended to protect workers' rights to self-organization and to encourage collective bargaining.

After the Railway Labor Act of 1926 had been enacted, Congress was apparently in the mood to legislate away some of the inequities imposed by the courts upon labor-management relations. In 1927, public hearings over an anti-injunction bill were begun. In 1932, the Norris-LaGuardia Act was enacted, which had been constructed to greatly curtail the use of injunctions against union organizing and collective bargaining. The Act very clearly stipulated that the courts were to leave unions free to strike, to picket, and to boycott. Only in cases where violence or fraud were present or union activity fell outside the scope of a very broadly defined "labor dispute," were the courts free to enjoin union related activity. In addition, the Norris-LaGuardia Act made yellow-dog contracts unenforceable in the courts. Again, to the surprise of many, the U.S. Supreme Court upheld the constitutionality of that act.

A further legislative development that was to serve the union movement was passage of the National Industrial Recovery Act (NIRA) of 1933, a cornerstone of President Roosevelt's general New Deal plan to bring the country out of the depths of the great depression. Section 7(a) of the NIRA is of particular interest here, as it had the purpose of protecting the rights of workers to form or join unions of their choosing and to engage in collective bargaining. The underlying purpose of Congress in Section 7(a) was to increase the purchasing power of workers and consequently help the recovery of U.S. industry. Congress, however, failed to spell out what was legal or illegal behavior. Nor were any mechanisms provided to interpret the intent of Section 7(a) or provide for its enforcement. A wave of union strike activity occurred that summer, which apparently prompted

President Roosevelt to create the National Labor Board to interpret and enforce the new law. However, over the next year it became quite evident that the labor board could not effectively execute the law against employer recalcitrance and union impatience. Frustrated by the labor board's inability to implement the law, Congress formed a new labor board in 1934. But, again, the labor board failed to be effective—it simply could not enforce its rulings (Taylor and Witney, 1983, pp. 166-174). Soon thereafter, the NIRA was held unconstitutional in its entirety by the U.S. Supreme Court (1935).[6]

## The National Labor Relations Act

Exactly one month after the ruling by the Supreme Court, Congress overwhelmingly passed the National Labor Relations Act, popularly called the Wagner Act after its primary sponsor, senator Robert Wagner. Considerable work had gone into drafting the Wagner Act in the months before its passage. Having witnessed the struggle and inability of the labor boards under the NIRA to protect the rights of workers to self-organization and collective bargaining, congressional leaders under the guidance of Senator Wagner foresaw the need for separate and clearly articulated legislation. That legislation, it was also believed, would need a labor board that could turn to the courts for enforcement.

To accomplish the broadly stated objectives of the NLRA, which declared that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in concerted activities for the purpose of collective bargaining," five unfair labor practices (ULPs) were spelled out.[7]

1. Employers could not "interfere with, restrain, or coerce employees in the exercise of their rights."
2. "Domination or interference with the formation or administration of a labor organization or contribution of financial or other support to it" was forbidden.

3. Employers could not discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization."
4. Employers could not "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act."
5. Employers could not "refuse to bargain collectively with the representatives of employees duly chosen pursuant to other provisions of the act."

A three-member National Labor Relations Board (NLRB) was established to interpret and enforce the Wagner Act. By hearing charges against employers in violation of the five broadly defined ULPs stated in the Act, the NLRB was charged with making explicit those specific employer practices that were prohibited under the law. After an investigation into the merits of a complaint, the Board would order the employer to cease and desist his unlawful activity if they found the employer in violation of the Act. In addition, the NLRB was to fashion appropriate remedies (but not penalties) where necessary. In order to enforce the Board's rulings and remedies associated with ULPs, the Board could call upon the Circuit Courts of Appeal to direct employers to abide by Board decisions and orders. In chapter 2, we will examine in depth the procedures and practices of the NLRB with respect to union organizing and first-contract negotiations.

Passage of legislation and effectuation of its purposes are frequently two separate accomplishments. With respect to the passage and effectuation of the Wagner Act, little could be closer to the truth. On one hand, there was widespread defiance of the Act. Employers who were willing to go to great lengths to undermine union organizing and collective bargaining before the Act were no less willing to do so after the Act. Indeed, it appears that many employers were even more willing to resort to underhanded practices in order to skirt the law. On the other hand, the NLRB was also

swamped by suits against its own investigative and enforcement responsibilities.

> By February 1936 District Courts had granted nearly forty temporary injunctions. Of eleven cases already decided the courts had ruled against the government in five. Some district judges enjoined the board even from holding hearings, the basic preliminary procedural step. (Auerbach, 1966, p. 55)

It appears that these suits against the NLRB were generally based on questions of constitutionality. Many employers and their legal counsels simply believed the Wagner Act was unconstitutional and hence openly defied it. The principle of freedom-of-contract, it was held, was being abridged. Furthermore, the one-sidedness of the Wagner Act, wherein no ULPs by unions were promulgated, rubbed salt in the wounds of hardened anti-union employers but also disturbed more fair-minded employers and less interested parties.

It became quite clear that until the Supreme Court ruled favorably upon the constitutionality of the Wagner Act, the NLRB would have little effect upon enforcing its provisions. Employers therefore continued to discriminatorily discharge or refuse to hire union activists, maintain community-wide blacklists against union activists and sympathizers, refuse to recognize unions, maintain company unions, close plants in response to unionization, refuse to bargain in good faith when so ordered by the NLRB, enlist professional strike-breaking companies, and even stockpile munitions in factories. Perhaps most appalling to the general public was the widespread use of professional spies hired to infiltrate unions, to identify union sympathizers and monitor union strategies with regard to organizing, negotiations, and other concerted activity. Some spies went so far as to take over the leadership of local unions; their mission was to cause internal union strife and break up organizations.

This invidious display of employer animus toward unionization was brought to light during the LaFollette

Committee hearings which began in 1936. The decision to conduct the LaFollette hearings was in large part a response to the findings of investigations conducted by the NLRB in its earliest months of operation, findings that demonstrated to proponents of the Wagner Act that the purposes of the Act and the role of the NLRB were, without doubt, being undermined.

Although the LaFollette Committee investigated the abridgement of civil liberties other than in union-management relations, in its first year of hearings it detailed anti-union practices of industrial espionage, intimidation of union activists by armed private police, professional strikebreaking, and the stockpiling of munitions on company premises.

> These accoutrements of industrial strife represented the underside of industrial relations. Their frequent use convinced the LaFollette Committee that management was conducting 'a colossal, daily drive in every part of the country to frustrate enunciated labor policy. . . .' (Auerbach, 1966, p. 97)

Although the LaFollette Committee made it quite evident to the public that workers were being denied the right to self-organization and collective bargaining (in the most disdainful of ways), it was not until the Supreme Court (in February 1937) ruled upon the constitutionality of the Wagner Act that the NLRB was able to begin effectuating the law. In that historic decision, probably the most important Court decision in U.S. labor history, the Court examined both the issue of the Act's jurisdiction with regard to interstate commerce and whether or not the potential of labor-management strife affected the free flow of commerce. The facts of the case dealt with the discriminatory discharge of 10 union members involved in organizing activities associated with a plant owned by Jones & Laughlin Steel Corporation. The NLRB had found Jones & Laughlin in violation of Section 8(a)(3), which forbids discrimination against employees for union

activity. The Supreme Court's decision rested largely upon the following arguments.

> The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. . . Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce. . .
>
> Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. . .[8]

## Amendments to the NLRA

The evidence indicates that after the question of constitutionality of the Wagner Act was settled, union membership rose at an unprecedented rate, rising from some 4 million members in 1936 to roughly 15 million in 1947. The years following the Wagner Act, however, were not necessarily peaceful ones and it became more and more apparent that unions—not unlike employers—were willing to commit unpalatable labor practices. With substantially greater power, unions were able to engage in strikes and boycotts far more effectively than any time in American history. With this

power and its exercise in full public view, the public became more aware of its abuses. For instance, John L. Lewis, the powerful president of the United Mine Workers publicly defied President Roosevelt and the National War Labor Board in 1943 when he steadfastly refused to order the mine workers back to work during World War II. Ironically, further abuses stemmed from the rivalry between the AFL and the Committee for Industrial Organization (CIO). The CIO had embarked successfully upon organizing basic industries, such as steel and autos, with the purpose of organizing all skill levels. The AFL, however, wanted all craft workers in these industries under their own umbrella. Unanticipated by the proponents of the Wagner Act, the two powerful organizations clashed and often fought bitterly over jurisdictional rights. The clash between the AFL and CIO tied the hands of many employers caught in the middle of strikes and boycotts over these jurisdictional disputes; workers, too, were caught in the middle.

Other abuses arose as unions utilized strikes and boycotts against employers not directly involved in given labor disputes, attempted to impose "closed shop"agreements on disinterested employees (i.e., all workers must join the union before being hired), and discriminated against black workers. With the election of many Republicans to the U.S. Congress in 1946, coupled with an unprecedented wave of strike activity during the same year and a public impression that unions were being infiltrated and controlled by communists, the stage was set for a major change in the Wagner Act.

Passed over the veto of President Truman, the Taft-Hartley amendments to the NLRA were signed into law in 1947. The focus of these amendments was upon union unfair labor practices. For the most part the employer ULPs contained in the Wagner Act were not altered. Instead, the general intention of Congress was to balance the NLRA, checking the power of both unions and employers and, in turn, promoting the peaceful resolution of labor-management conflict.

As stated in a declaration of policy of the Taft-Hartley Act:

> It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare and to protect the rights of the public in connection with labor disputes affecting commerce.

The heart of the amendments read:

> "It shall be an unfair labor practice for a labor organization or its agents -
>
> (1) to restrain or coerce (a) employees in the exercise of the rights guaranteed in Section 7 . . . or (b) an employer in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee" for nonmembership in the union unless a union-shop agreement is in effect and the employee fails "to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> (3) to refuse to bargain collectively with an employer . . .
>
> (4) To engage in or to induce or encourage the employees of any employer to engage in, a

strike . . . to use, manufacture, process, transport or otherwise handle" goods with the objective of:

"(A) forcing or requiring any . . . self-employed person to join any labor . . . organization . . .

(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . .

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees . . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . .

(5) to require of employees covered by an agreement . . ." any initiation or admission fees "in an amount which the Board finds excessive or discriminatory . . ." and

"(6) to cause or attempt to cause an employer to pay . . . for services which are not performed or not to be performed . . ."

In addition to the above unfair labor practices, the Taft-Hartley Act amended the NLRA in several other important ways which are of special interest to our inquiry about union organizing and first-contract negotiation outcomes. First, under Section 7 of the Wagner Act, the following clause was added in order to make it clear that workers could refrain from forming, joining, or assisting unions if they so desired, except where a legitimate union-shop agreement had been made: "Employees . . . shall also have the right to refrain from any or all such activities." Second, Section 14(b) allow-

ed states to establish so-called right-to-work laws, whereby no employer and union within the given state could enter into union-shop agreements (i.e., workers must join unions after being hired). Hence, in states passing such legislation, workers under a collective bargaining agreement were still free not to join the union. Unions, however, still would be required to represent fairly these employees as the exclusive representative of all employees in a given work unit. Finally, the size of the Board was increased from three to five members. The purpose of this change was to better facilitate the speedy handling of representation elections and the resolution of labor-management disputes.

The NLRA was further amended in 1959 with the passage of the Labor-Management Reporting and Disclosure Act, more widely known as the Landrum-Griffin Act. Only Title VII of the Landrum-Griffin Act, however, amended the NLRA. All other titles were promulgated in an attempt to insure union democracy, rid unions of corruption by union leaders and corruption between union leaders and employers, and to regulate the use of union funds. Although there are a number of important amendments under Title VII (especially those closing loopholes involving secondary boycotts), two amendments are especially pertinent to our investigation and those are briefly discussed next.

First, Section 8(b)(7) was added as a seventh union ULP to the six enunciated in the Taft-Hartley Act. The proviso holds that it is unlawful for a union:

> to picket . . . or threaten to picket . . . any employer where the object thereof is forcing or requiring an employer to recognize or bargain with a labor organization . . . or forcing or requiring the employees of an employer to accept or select a labor organization as their collective bargaining representative. . . .

The basic restrictions against picketing for recognition purposes are that picketing cannot be conducted (1) for more than 30 days, given that the union files a successful petition

with the NLRB to hold a certification election, (2) if another union has been lawfully recognized as the representative of the employees, or (3) if a valid election concerning union representation has been conducted within the previous year.

Second, cases of discrimination against employees by either employers or unions for union activities or inactivities are to be given priority treatment over all other cases in the regional office in which they are filed, except for cases where the Board is compelled under section 10(l) of the Act to seek injunctions against illegal union strikes, pickets, and boycotts.

Except for bringing the U.S. Postal Service and nonprofit hospitals under the NLRA in 1971 and 1974, respectively, the Act has not undergone any substantive changes since 1959. However, a labor law reform bill that would have included several important amendments to the Act was passed easily in the U.S. House of Representatives in 1977 but failed—by one vote—in the Senate by filibuster. The provisions of the reform bill were aimed at speeding up NLRB procedures and case handling and reducing the incidence of discriminatory discharges and employer bad faith bargaining during first-contract negotiations. Many of the bill's provisions are discussed and evaluated in chapter 4 and hence are not covered in this chapter.

## Summary

During the period 1806 to 1932, the federal government allowed, for the most part, the federal and state judiciaries to dictate public policy regarding union organizing and collective bargaining. It is clear that the federal courts were *hostile* toward union organizing and collective bargaining. Their concerns were primarily with disruption of interstate commerce, freedom-of-contract, and private property rights. The courts initially saw unions as criminal conspiracies under common law and later as monopolies under antitrust legislation; they readily granted injunctions against concerted union activities and enforced yellow-dog contracts.

Although the U.S. Congress passed legislation to give workers limited rights of organizing and collective bargaining (i.e., the Erdman Act, Clayton Act, and Railway Labor Act) it was not until the Norris-LaGuardia Act of 1932 was passed by Congress that legislative action successfully blocked the judiciary from handing out injunctions and enforcing yellow-dog contracts. In 1932, the legal environment surrounding union organizing and collective bargaining shifted course from a long period of hostility to one characterized as a *hands-off* approach. Shortly thereafter, however, with the U.S. Supreme Court ruling favorably upon the constitutionality of the Wagner Act in 1937, the legal environment became one that *encouraged* union organizing and collective bargaining and in today's sociopolitical context, ignored the rights of employers and workers not interested in collective bargaining. With passage of the Taft-Hartley Act in 1947, the legal environment then shifted to one of intended *neutrality,* protecting the rights of workers to decide whether or not they wanted union representation and balancing the power of both unions and employers. Since 1947, that general philosophy of labor relations law has been maintained.

Legal philosophy and its day-to-day realization, however, are frequently at odds. Part of being at odds can be attributed to the fact that parties subject to the law and affected adversely by it, often work hard to successfully undermine it. Disparity between legal philosophy and practice can also be attributed to the fact that the makers of law are unaware that legal niceties often fail to result in anticipated outcomes. With respect to negotiating first contracts, it will be shown in this study that many employers have found efficient and cheap ways to undermine the law. In turn, policy recommendations that obviate some legal niceties are prescribed in an attempt to bring day-to-day practices in line with our legal philosophies.

## NOTES

1. *Loewe v. Lawlor,* 208 U.S. 274 (1908).
2. *Duplex Printing Press v. Deering,* 254 U.S. 443 (1921).
3. *Hitchman Coal Company v. Mitchell,* 245 U.S. 229 (1917).
4. *In re Debs,* Petitioner, 158 U.S. 564 (1895).
5. *Texas & New Orleans Railroad v. Brotherhood of Railroad Clerks,* 281 U.S. 548 (1930).
6. *Schecter Poultry Corporation v. United States,* 295 U.S. 495 (1935).
7. National Labor Relations Act, 29 U.S.C. 157 (1976).
8. *NLRB v. Jones & Laughlin Steel Corporation,* 301 U.S. 1 (1937).

# Chapter 2

# The National Labor Relations Board

We can now take a close look at the NLRB: its structure, its procedures, its policies, and its increasing case load. Although the NLRB derives its responsibilities and authority from the NLRA, the U.S. Supreme Court has shaped its policies and the circuits courts of appeal must enforce its decisions and orders. Section 9 of the NLRA lays out the responsibilities and operational framework of the NLRB with regard to conducting representation elections, and Section 10 lays out the responsibilities and operational framework of the NLRB with regard to unfair labor practices. As one can see, the NLRB wears two hats: one to conduct and monitor elections to determine whether or not a majority of workers want to be represented by a union and a second to resolve charges that employers or unions have committed ULPs under the law. In order to understand the role and impact of NLRB procedures and policies upon the likelihood that unions fail to obtain contracts after winning representation elections, we will need to understand both functions of the NLRB. It will be shown in chapter 3 that when the NLRB puts on its second hat, the first hat is often toppled.

In this chapter we will first review the structure of the NLRB and its jurisdiction. We will then examine the pro-

cedures and policies imposed upon and adopted by the NLRB to conduct representation elections. Subsequently, the procedures and policies of the NLRB to resolve ULPs are described. Finally, we will examine in some detail several NLRB-related factors that are suspected of influencing the likelihood that unions obtain first contracts.

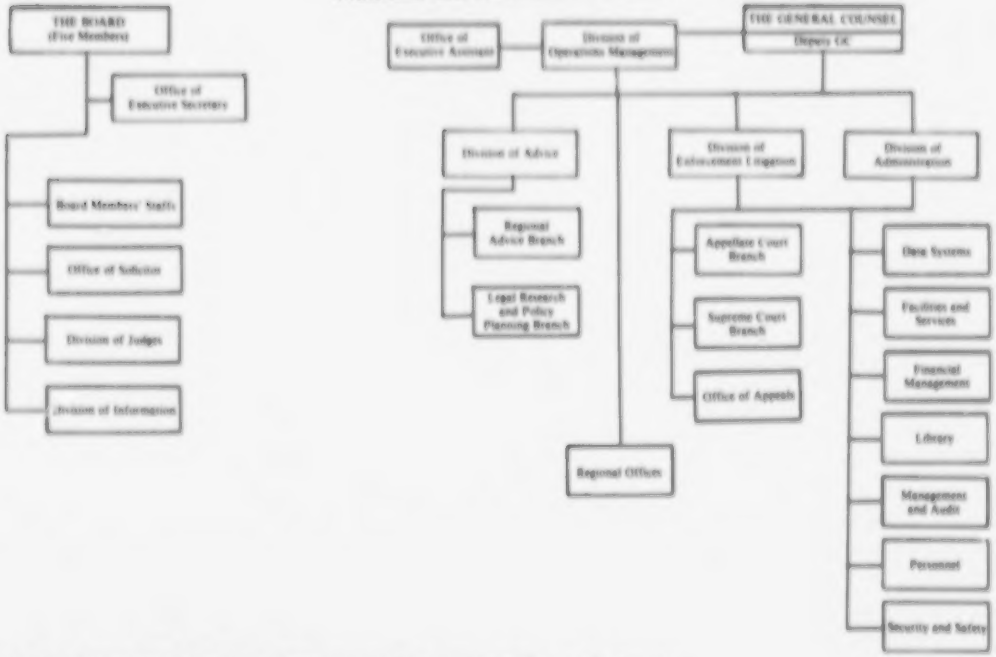
## NLRB Structure

As depicted in figure 2-1, the Board and the General Counsel have separate functions: the former acts as judge and the latter as prosecutor.[1] Prior to 1947, the Board acted as both judge and prosecutor. The Taft-Hartley Act severed these roles. The General Counsel's office supervises the activities of the regional offices, conducts and administers both union representation elections and investigations into ULP complaints. The General Counsel also holds responsibility for any litigation proceedings necessary to effectuate the policies of the Act (e.g., injunctive relief) and the decisions and orders of the Board. The Board, whose office is in Washington, DC, hears ULP complaints that are not settled informally by the regional office staff and are contested by the losing party subsequent to a hearing and decision by an administrative law judge. In light of its interpretation of the NLRA, the Board decides the merits of ULP complaints and prescribes remedies to effectuate the policies of the NLRA. It also resolves objections and challenges to representation election outcomes and in some cases resolves questions of appropriate makeup of bargaining units.

Both the Board members and General Counsel are presidential appointments which require confirmation by the U.S. Senate. Board members serve five-year appointments, while the General Counsel serves four years.

In order to effectuate the broadly stated responsibilities above, the Board exercises full and final authority over the Offices of Executive Secretary and Solicitor, and over the

## Figure 2-1
## National Labor Relations Board




SOURCE: NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended (Washington, DC: U.S. Government Printing Office, 1979), p. 333.

Divisions of Judges and Information (see figure 2-1). Each Board member exercises full and final authority over his or her own staff of legal counsel. The Office of Executive Secretary receives and assigns cases brought before the Board and issues and serves all Board decisions and orders. Board member staffs are comprised of lawyers who assist their respective Board members in preparing case decisions. The Office of the Solicitor acts as legal advisor to the Board regarding questions of law and policy, any pending legislation affecting the NLRA, or litigation affecting the Board. The Division of Judges is the division responsible for the supervision of hearings conducted by administrative law judges involving ULP complaints. The Division of Information acts as the Board's liaison with the media and the general public.

The General Counsel's Washington, DC staff (who report to the Deputy General Counsel responsible for overall organizational coordination) include the Divisions of Operations Management, Advice, Enforcement Litigation and Administration. The Division of Operations Management assists in the coordination of all General Counsel operations within Washington, DC and between the Washington, DC office and the various regional or other field offices. The Division of Advice is responsible for providing legal research and advice to the Regional Directors with regard to complex and/or novel legal questions concerning ULPs and injunction proceedings. The Division of Enforcement Litigation has responsibility for all NLRB litigation in the U.S. Circuit Courts of Appeal and U.S. Supreme Court. This litigation includes enforcement of Board orders and its defense before the courts when Board decisions and orders are appealed by losing parties. Within this division is the Office of Appeals, which reviews ULP charges denied by the regional offices and, in turn, recommends actions to the General Counsel. The Division of Administration is responsible for general administration, support services, and financial management.

Outside of the Washington, DC divisions of the General Counsel are 33 regional offices and 19 subregional and resident offices. Regional Directors supervise staffs of attorneys and field examiners in the investigation and processing of ULPs and union jurisdiction disputes and in the administration of representation elections. In addition, Regional Directors may initiate district court injunctive relief as mandated in Section 10(l) of the Act.

### Election Policies and Procedures

There are three basic types of representation elections conducted by the NLRB. The first is called a certification election which involves workers who are not currently represented by a union certified by the NLRB. The second is called a decertification election, which involves workers who are currently represented by a union certified by the NLRB. This is an election to decide whether or not the majority of workers want the given union to continue representing them for purposes of collective bargaining. The third type is called a deauthorization election, which allows workers to decide whether or not the union and employer are to continue under a union-shop agreement. In all three elections the majority vote decides the outcome. Our interest here is with certification elections, since they precede first-contract negotiations. The Act also allows employers to forego elections yet recognize and negotiate with unions showing majority support. But again, our present interests do not lie with this generally uncommon practice.

A union, employee, or employer may petition the NLRB to conduct a secret ballot certification election. Employers rarely petition for elections, however. There are only two circumstances in which the law allows employers to petition for an election: (1) after a union requests the employer to voluntarily recognize it and (2) after a union has, for organizational and recognitional purposes, picketed the employer for more than 30 days. In the first instance, unions normally file

a petition once the employer refuses voluntary recognition. In the second instance, the union (realizing it has little chance to win an election) disclaims its interest in representing the workers and ceases the picketing.

In conducting a certification election, the NLRB must initially decide on several issues. First, the regional office staff must find a sufficient "showing of interest," which requires that at least 30 percent of the prospective bargaining unit seeks representation by a given union. Here the NLRB generally relies upon the signing of "union authorization" cards by workers within the proposed unit. These cards must clearly state that the person signing the card wants the given union to represent him or her in collective bargaining. However, some workers later change their minds and are not compelled to vote for the union on election day.

A second question that must be decided at the outset is whether or not the NLRB has and is willing to exercise jurisdiction over the employer. The NLRB has been granted by the Supreme Court broad authority in deciding its jurisdiction over interstate commerce. However, even from its inception the NLRB has not had the resources necessary to exercise the full breadth of its statuatory responsibilities. In 1950, the Board shifted from a policy of deciding jurisdiction on a case by case basis to one that established sales volume thresholds by industry. In 1958, the Board revised these earlier standards. For example, for most nonretail enterprises the standard was set at $50,000 of sales or service volume either purchased or sold across state lines. For retail enterprises, a total sales volume standard was set at $500,000. Surprisingly, these standards have not changed since 1958, in spite of inflation.

The third issue to be resolved by the NLRB is whether or not the petitioned unit of workers is appropriate for collective bargaining purposes. The NLRA states that the "Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision

thereof." The Act goes on to hold (1) that professional employees must have a separate right to vote upon their inclusion in units that include nonprofessional employees and (2) that plant guards must be represented by unions that bargain exclusively for plant guards. In addition, the term "employee" was defined in such a way that agricultural workers, domestic service workers, and supervisors are excluded from protection provided by the Act.

Except as restricted by the Act, the Board is faced with complex decisions concerning appropriate unit determination. In making these decisions, the Board examines several criteria on a case-by-case basis. Generally, it seeks to find a "community of interests" among the work unit under consideration. These criteria largely include (1) similarities in skills, duties, and working conditions; (2) the nature of an employer's organization (e.g., the organizational and supervisory structure, the integration of various operational functions, and physical proximity); and (3) the employees' preferences.

Once the regional office has found a sufficient "showing of interest," decided jurisdiction over the employer, and made an initial decision on the appropriateness of the petitioned bargaining unit, the regional office contacts the employer informing him that an election will be held. At this point, the NLRB staff ask the employer to "consent" to an election involving the proposed unit. The employer may contest the makeup of the unit under consideration. If he does, NLRB staff then attempt to get the employer and union to agree (or compromise) on a suitable alternative combination of workers. The union will invariably prefer the original makeup since it comprises a work unit of which the union can expect substantial (if not majority) support in an election. The employer, on the other hand, may wish to limit the union's chances of winning the election and, hence, will argue for a different makeup—one, for instance, that would include workers in other stores or plant departments whom the employer perceives are less sympathetic to union representation. In any case, if the parties cannot agree on the

appropriate unit, then a hearing is called to examine more closely the dispute over the determination. If a hearing is held, the election becomes what is known as a Regional Director-ordered election, in which the Regional Director decides the appropriate unit. In novel or complex cases, the Regional Director may pass the decision on to the five-member Board to decide upon the appropriate unit—something that rarely transpires. These cases result in so-called Board-ordered elections.

If the parties can agree upon the unit without a hearing, the election is called a "consent" election. The parties have two options under the consent decree that pertain to the right of appeal of any objections or challenges that rise over the election. The parties can decide to give the Regional Director final say in the resolution of any objections or challenges or they may opt to give the five-member Board final say in all objections and challenges. Opting for the latter results in what is known as a "stipulated" election (or "stip" as it is commonly called).

The majority of elections are generally held within one to three months of the petition date. When a hearing is held under a Regional Director-ordered election, it often takes several more months. The regional office, in any case, notifies the parties of the date and place of the election. Regional office staff conduct the secret ballot election and count the votes soon thereafter, typically in the presence of employer and union representatives. If either the union or employer question the right of any individual to vote, they may "challenge" an individual's ballot as it is being cast but not after the election. Challenged ballots are not opened unless the election is sufficiently close so that the number of challenged ballots potentially could change the outcome. For example, say the union obtains 60 votes and the employer (i.e., "no union") obtains 55, but there are 5 challenged ballots. Upon an investigation of each and every challenged ballot, the Regional Director decides whether or not each challenged ballot was cast by an individual with a right to

vote. If, in the example above, all five challenged ballots were valid ballots and each ballot was a vote for "no union," then the revised tally would be 60 to 60 and the union would have lost the election. Anything short of 5 votes for "no union" would result in an election victory for the union, regardless of the validity of the challenged ballots.

Objections to the election conduct of either party must be filed within five working days of the close of the election, regardless of any challenges made. The evidence filed with objections must be sufficient to provide a *prima facie* case. The regional office then investigates the objections filed. If either party has conducted itself in such a way as to sufficiently deny workers their rights under Section 7 of the NLRA, then the NLRB can set up a rerun election. In cases where the employer's activity has been so egregious that conducting a second election would be a futile exercise, the Board may order the employer to recognize and negotiate with the union. In cases where bargaining orders are made by the Board, the union will have had to submit meritorious ULP complaints in conjunction with the objections. Unions charging employers with having committed ULPs typically sign a "request to proceed" with the election so that the election is not delayed pending resolution of the charge. In this way, if the union wins the election, it need not seek a bargaining order. If it loses the election, it can, in turn, seek a bargaining order. Before explaining in detail the procedures and policies of the NLRB in investigating objections and taking appropriate action, let us first examine what the Board and courts deem as unlawful campaign conduct.

## Unlawful Campaign Conduct

The NLRA left to the NLRB the responsibility of establishing any governing principles or guidelines to insure that workers, in exercising their rights to decide upon union representation, will not be restrained or coerced by either employers or unions. It should be understood from the outset that, generally speaking, no single campaign activity

by either employers or unions is sufficient to overturn the results of an election, but instead the NLRB and courts have adopted a "totality of conduct" doctrine. Under this doctrine, a party's campaign conduct is examined in its totality and any single activity is considered in light of total conduct. It is beyond the intended scope of this study (nor is it necessary for our general purpose) to develop fully all issues central to campaign conduct. Instead, only the more salient campaign behavior that is likely to lead to the filing of objections and the setting aside of elections will be highlighted.

Perhaps the clearest form of coercion is the discriminatory discharge of union activists during election campaigns. Section 8(a)(3) of the NLRA makes it an unfair labor practice anytime an employer discriminates "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The evidence indicates that 95 percent of Section 8(a)(3) violations entail discharges and that roughly 90 percent of these occur during election campaigns or during first contract negotiations.[3] The purpose of the discriminatory discharge during election campaigns is not only to remove key union activists from the campaign but also to effectively coerce employees from voting for the union. Discharges have the same chilling effect on the work unit after the union wins the election and begins to negotiate a contract. (That evidence is presented in chapter 3.) Discriminatory discharges are at once ULPs that are resolved via the NLRB ULP complaint procedure (discussed below) and are also used as evidence in hearings and decisions by the NLRB regarding objections filed to the election.

Section 8(c) of the Act also states that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be an unfair labor practice under the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Based on this section, the Board has had to interpret and weigh the statements of both employers and unions with respect to what is "free speech" vis-a-vis threats or promises. The exercise of free speech is legal, of course, while threats or promises provide grounds for setting aside an election. Deciding which is which is complex, and neither the Board nor the courts have laid down any hard and fast rules. As a basic rule-of-thumb, the distinction between free speech and an illegal threat is determined by the degree of control the employer or union might have to effectuate the statement. For example, if an employer states in his campaign that unionization is likely to lead to strikes and loss of customers, there is no threat or promise in the eyes of the law. If, on the other hand, the employer also states that a department will likely be closed or there likely will be layoffs, the Board would generally interpret this as a threat since the employer has control over such outcomes (see Feldacker, 1983, pp. 115-118).

There are, of course, more obvious forms of threat. It has been widely reported, for example, that some union agents or activists play "mean ball" with co-workers who demonstrate antiunion sympathies. Strong verbal or physical threats appear to be the most widely used form of coercion by unions. Although we do not have any statistics on how widespread such behavior is, a cursory review of court cases of employer objections to elections indicates that threats of physical harm are made frequently.

In 1948 the NLRB ruled in the now famous General Shoe decision that illegal campaign conduct need not be an unfair labor practice as defined by the Act. Instead, the Board ruled that any conduct which creates an atmosphere such that it becomes unlikely that workers will be able to exercise their free choice is grounds for setting aside an election.[1] In General Shoe, the Board emphasized that elections should be conducted as closely as possible to "laboratory conditions." The Board's interpretation of the intent of Congress opened up a wide range of employer activities that would contribute to the totality of conduct doctrine and provide grounds for

setting aside elections. These activities include but are by no means limited to the conduct described next.

Employers cannot visit employees' homes to urge them to vote against the union. Such a personalized campaign tactic is seen as intimidating. Employers cannot discuss with employees in small groups in any places of employer authority (e.g., in a supervisor's office) the matter of voting against the union. The employer can, however, assemble all employees during working hours to deliver a general speech against union representation. This is known as the "captive audience" doctrine.[4] Such captive audience speeches must be void of threats or promises and cannot be made within 24 hours of the election. Employers cannot convey to the employees that their efforts to bargain collectively are futile. That is, it would be grounds for setting aside an election for an employer to hold that he only has to recognize and negotiate with the union if it wins and, as such, employees should not expect any increases in wages or improvements in working conditions because he has no intention of doing so. Appeals to racial prejudice by the employer, whereby the intention is to pit blacks against whites, are also prohibited by the Board. Finally, the Board has used the General Shoe decision to set aside elections when employers use or give the impression of using surveillance of worker involvement in union organizing activities. Surveillance or the impression of surveillance is interpreted by the Board as a form of coercion or intimidation intended to discourage employees from being actively involved in union organizing.

In 1962 the NLRB extended the laboratory conditions rule to include misrepresentation of facts. In particular, when either the union or employer made statements which departed substantially from the truth (whether deliberate or not), which (a) were presented at a time just prior to the election date so that the other party could not reply effectively and (b) could be expected to have a significant impact on the election outcome, then the Board would have grounds for setting aside the election. This standard of campaign misrepresentation held from 1962 (Hollywood Ceramics)'

until April 1977 when the Board decided in the Shopping Kart Food Market[6] case that workers were sufficiently mature and capable of recognizing misrepresentations for what they were, namely, campaign propaganda, and in turn would discount it. Except in cases of fraud, the Board held that misrepresentation does not impact upon election outcomes and, hence, would not be grounds for setting aside elections. However, in December 1978 the Board reversed itself on the issue of misrepresentation and fell back to the earlier Hollywood Ceramics rules.[7] But just to confuse matters, the Board resurrected the Shopping Kart rules in 1982.[8]

It is difficult to say whether, in general, unions or employers gain more by relaxation of laboratory conditions governing misrepresentation. It would seem, however, that the number of objections filed should be reduced since neither party would be able to provide *prima facie* cases as easily as they would be under rules requiring laboratory conditions. With respect to obtaining first contracts subsequent to a union victory, relaxation of misrepresentation standards should work to the advantage of unions in that the long delays typically associated with resolving objections significantly reduce the likelihood that unions obtain first contracts. Although we have no evidence readily available as to what proportion of employer objections entail questions of misrepresentation, a cursory overview of circuit court cases suggests that claims of misrepresentation account for a large part of the objection case load brought by employers.

In conclusion, the NLRB investigates timely filed objections that establish *prima facie* cases. There are a number of criteria used by the NLRB to decide the validity of objections and these criteria are weighed in light of the totality of campaign conduct. Next, we describe the procedures and policies of the NLRB in their investigation and rulings on objections.

## Objection Procedure

Upon receiving a timely objection, the Regional Director must consider two basic elements of the *prima facie* case.

First, do the facts of conduct as presented, if true, potentially warrant setting aside the election? If the Regional Director decides they do not, then he may immediately overule the objection. If they do, on the other hand, the Regional Director orders an investigation to ascertain the truth of the stated facts, which is the second element of making a *prima facie* case. If this investigation uncovers evidence suggesting the facts of conduct are questionable, then a hearing is scheduled to delve further into the facts surrounding the objectionable conduct. If it is concluded from the hearing that the facts as presented in the objections are not true, the Regional Director will overrule the objection.

In those cases in which the NLRB finds the facts of objectionable conduct to be true (either with or without a hearing), then the Regional Director must decide whether or not the conduct would have a significant impact on the election. Here, NLRB policy requires the Regional Director to infer whether or not the conduct would change the minds of voters to such a degree that the election outcome would have been different had the objectionable conduct not occurred.

In nonstipulated consent elections (about 3-4 percent of all elections today), the Regional Director supposedly has final say with regard to sustaining or overruling objections. In all other elections, the party filing the objection can appeal the Regional Director's recommendation to the five-member Board. The Board, in hearing the exceptions made, first determines whether in those cases in which a hearing was not held, indeed, a hearing should have been held. The Board can order a hearing if it believes there is sufficient ambiguity about the facts to warrant a hearing. In those cases where there was a hearing or no need for a hearing, the Board then evaluates the Regional Director's recommendation based on its merits. Both the merits concerning (a) the Regional Director's finding about the stated objectionable conduct and (b) the Regional Director's inference about whether or not the objectionable conduct influenced the election outcome are evaluated by the Board. The Board then decides to either sustain or overrule the Regional Director's recommendation.

Neither the union nor the employer can appeal the Board's decision and order regarding objections. As discussed below, however, an employer, by refusing to bargain with the union, can force his objections and challenges to be heard by the appellate courts.[9]

If the five-member Board sustains the objections of an employer (who lost the election), then the Board sets aside the election and directs the Regional Director to conduct a rerun election. The purpose of the rerun election is to allow employees another opportunity to cast their votes in an election unfettered by election improprieties. If the Board sustains the objections of a union (which lost the election), then the Board can either order a rerun election or order the employer to recognize and negotiate with the union. The latter option is triggered when circumstances indicate the anti-union animus of the employer effectively prohibits a legitimate election from being held. If the Board overrules an employer's objections to the election, the Board certifies the union and orders the employer to negotiate a contract. If the Board overrules a union's objections, then a 12-month bar from any further elections is put in place. Let us next briefly review the Board's discretion in ordering rerun elections and ordering employers to negotiate first contracts.

### Bargaining Orders and Rerun Elections

In a controversial landmark Supreme Court decision in 1969 (known as the Gissel case), the high court established the ground rules (albeit somewhat vaguely) governing the Board's decisions regarding election reruns and bargaining orders (in spite of a union's loss at the polls).[10] Generally speaking, an employer need not recognize a union without first benefiting from a secret ballot election—unless the employer commits ULPs that undermine union organizing. If the employer has effectively undermined the union's majority support through his use of ULPs, the Court allows the NLRB to order the employer to recognize the union without the benefit of an election. Our interest, however, pertains to

the resolution of objections to elections. Here, the Supreme Court first requires the Board to examine the objections and any ULP charges stemming from the election campaign. Next, the Board must decide, depending on the severity of the objectionable conduct and ULPs, which of three categories a case falls within. If the employer's conduct was such as to have "minimal impact" upon the election outcome, the Board can order a rerun election but not order the employer to bargain with the union. At the other extreme, if the employer's behavior was "pervasive and atrocious" to the extent that a fair election could not be held, then the Board is granted the authority to order the employer to bargain. This authority holds even though the union might fail to show that a majority of employees had signed union authorization cards. The third category lies somewhere between the first and second. If the employer's misconduct is not outlandish, on the one hand, yet not minimal on the other hand, the Board has authority to order the employer to bargain with the union, given that at some point the union showed through authorization cards that it had majority support prior to the election.

Procedurally, if the Board orders a rerun election, it first orders the employer to cease and desist its unlawful activity and requires the employer to post a notice of the NLRB's order in which the employer agrees to comply. After compliance is met, the Regional office establishes the date of the rerun election. If the Board sets aside the election based on the objections and likewise finds that ULPs have been committed which meet the Gissel criteria, then a bargaining order can be issued.

In summary, the NLRB conducts secret ballot elections. In those cases where neither the union nor the employer committed ULPs or other objectionable conduct to invalidate the election outcome, the NLRB either certifies the victorious union as the exclusive representative of the employees or

bars any further elections for 12 months following a union loss. In those cases in which the union loses but the NLRB sustains union objections, elections are rerun. Where the NLRB also finds the employer has committed ULPs during the election, the Board may issue a bargaining order.

Although having successfully imposed a legal obligation on the employer to bargain in good faith over the first contract, the union drive is not necessarily yet out of the woods. Recalcitrant employers seeking to stall the obligation to bargain or employers dissatisfied with a Board's ruling about objections, challenges, and ULPs have yet another route of appeal. By simply refusing to bargain, the employer triggers the ULP procedure of the NLRB. Through this separate procedure, the employer is able to get a circuit court of appeals to re-examine his objections or challenges to the election. Although he may get a reversal on the Board's decision and order, at the very least the employer stalls his obligation to bargain for many more months, if not years. In the following section, we examine an employer's obligation to bargain in good faith and describe the ULP complaint procedure employed by the NLRB.

## The Duty to Bargain in Good Faith

Section 8(d) of the NLRA compels the parties to negotiate in good faith once the union has been duly certified for such purposes. It states:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, of the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if re-

> quested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Congress obviously intended for the parties to confer in good faith with the intention of entering a contract. The Act, however, specifically states that neither party must agree to any proposal or make any given concession. The Board, of course, is charged with interpreting Section 8(d) and establishing any rules or guidelines applicable to the duty to bargain in good faith.

Outright refusal to meet with the union to bargain is clearly an unfair labor practice. Except in cases where the employer seeks court review of objections and challenges, few employers take such blatant positions. Although one can imagine that most employers would prefer not to recognize and negotiate with unions, the majority act in accordance with the law, having intentions to enter agreements when so required. That generalization, however, does not imply that each party will not take full advantage of permissable legal tactics in order to make the most of their own relative power positions. The parties definitely do.

In deciding on what behavior is legal or illegal, the Board takes a case-by-case approach and, except in the most flagrant demonstrations of bad faith bargaining, will rely on a totality of conduct doctrine. Within this totality of conduct framework, the Board has established a number of restrictions on both employers and unions. Since our intention here is only to highlight the more salient general restrictions that are especially relevant to first-contract negotiations, certain restrictions applicable to the renewal of contracts or long term bargaining relationships are not reviewed.

Among specific restrictions, the Board has found it illegal for an employer to make unilateral changes before the contract is agreed upon. Hence, employers who want to undermine the purpose of union representation by unilaterally improving wages or other terms and conditions of employment

are prohibited from doing so. Nor is it lawful for employers to circumvent the union's bargaining responsibility by offering improved wages or working conditions directly to the employees. In short, once the union has been certified to represent the employees, the employer has an obligation to bargain with the union and only with the union.

In 1958, the Supreme Court upheld the Board's ruling that the Borg-Warner Corporation had, in bad faith, forced the union to agree to two provisions in a contract which the striking union did not want.[11] In ruling on the case in favor of the union, the Board established three categories of bargaining demands. In the first category fall all demands that are illegal (e.g., closed shop agreements). It would be considered bad faith bargaining to make such demands in negotiations. In the second category are mandatory items, which would include, for example, provisions concerning wages, hours, fringe benefits, contract duration, layoff policies, and retirement policies. If either party raises a mandatory bargaining demand, the other part is obligated to negotiate in good faith over that demand, else the party violates Section 8(a)(5) of the Act. The third category includes all other issues that are neither illegal nor mandatory items, but instead are permissible items for negotiation. For example, the union might want to negotiate a contract clause extending contract provisions to other work units outside the given bargaining unit. These permissible demands do not obligate the other party to negotiate—the party may simply refuse. An important distinction between mandatory and permissive items is that negotiations may go to impasse over mandatory but not permissive ones. That is, if a union takes a walk (i.e., strikes) because the employer refuses to bargain over a permissive proposal, then the union is seen as bargaining in bad faith. In bargaining over mandatory items, however, the union, having negotiated to an impasse, may strike. (Feldacker, 1984, pp. 219-223) Under such circumstances, the employer may then unilaterally implement his final offers. He cannot, on the other hand, implement final offers if the impasse stems from negotiation over a per-

missive bargaining demand. One can readily imagine that there is a gray area between what is mandatory and what is permissive. It is this gray area (covering such issues as subcontracting and partial business closures) that causes considerable confusion and controversy over the subject of good faith bargaining obligations.

In an important case decided by the Supreme Court in 1970, the Board had ruled that the H.K. Porter Company had generally been bargaining in bad faith, as was evident over its refusal to grant the Steelworkers a dues checkoff provision in the contract.[12] The Board ordered the company to grant the demand to the union, arguing that refusing to grant such a trivial concession was made in bad faith. The high court, however, overturned the Board, holding that the law strictly prohibits the Board from compelling parties to agree even to very minor demands.

Similarly, the Board has held that employers cannot enter negotiations with a take-it-or-leave-it stance. Most famous for such hard bargaining stances was General Electric Corporation throughout the 1960s. Simply put, the company, under the direction of vice-president Lemuel Boulware, would determine unilaterally and in advance of any negotiations, the wages, hours, terms and conditions of employment. There were no negotiations. The union could accept the contract or strike! In 1964, the Board ruled that such tough bargaining postures (widely referred to as "Boulwarism") were in violation of section 8(a)(5).[13]

The Board also requires that, as a practice of good faith bargaining, employers must provide unions with necessary company information for costing out contracts. If the requested data (e.g., hours of overtime by department) are readily available, valuable to the union in considering a proposal, and not necessarily confidential in nature, then not providing such data would generally be an act of bad faith bargaining.

Sophisticated recalcitrant employers may go through all the necessary motions of good faith bargaining, being

careful not to step too far out of the bounds of the above restrictions. But their intention may not be to enter a collective bargaining agreement; instead they are simply "surface bargaining" as a way to undermine the union's potential strength. Such surface bargaining is indeed a violation of section 8(a)(5), but it makes it difficult for the Board to remedy. What the Board does is to look at the totality of the employer's behavior. Any combination of the following tactics, for example, are usually considered evidence of bad faith bargaining: failing to make any compromises or counter-proposals to the union's proposals, failing to provide reasonable explanations as to why the union's proposals are unacceptable, agreeing to minor provisions of a contract but refusing to agree on any substantive issues, postponing meetings or being flippant about negotiations, or proposing compensation levels and rules no better than or different from before first-contract negotiations began.[14]

Having briefly described conduct depicting bad faith bargaining, we turn our attention to the procedures used by the NLRB for resolving these and all other ULP disputes. In addition to the general steps, the special steps for resolving "technical" refusals to bargain and remedies for illegal discharges are reviewed.

### Resolving Unfair Labor Practice Complaints

Short of appeal to the Supreme Court, there are five basic steps to the NLRB's procedure of resolving ULP complaints. The first step requires an employer, a union, or individual to file a "charge" with a regional office. The ULP charge is assigned to a field examiner or attorney for investigation. Novel or especially complex charges may first be forwarded to the Division of Advice for clarification of Board policy or precedent. After the initial investigation, the Regional Director decides if the case is meritorious or not. If it is not, then the charging party is so advised and asked to "withdraw" the charge. If the charging party does not withdraw the charge then the regional office "dismisses" the case. Upon dismissal, the charging party may appeal to the Office of Appeals under the Division of Enforcement Litigation. The

regional office decision for dismissal is infrequently overruled and the charging party has no further means of appeal.

If the Regional Director finds the charge meritorious, then the second step for resolution is taken. Here, the party charged with the ULP is informed of the Regional Director's decision and asked to voluntarily comply by ceasing and remedying the unlawful behavior (e.g., reinstating and providing back pay to illegally discharged employees). Noncompliance results in a formal complaint made against the defendent (generally called the "respondent"). The regional office continues trying to obtain a settlement prior to the third step.

The third step is a hearing (without jury) before an administrative law judge (ALJ). The ALJ is independent of the Board and performs the duties of a judge, except that ALJ decisions are only recommendations to the five-member Board. An attorney from the regional office is the prosecutor acting in behalf of the complainant. The respondent may have his own attorney but it is the General Counsel's attorney that has the burden of proof to show that a violation of the Act has been committed.

If exceptions to the ALJ's recommendations are not filed with the Board within 20 days, the Board automatically adopts the ALJ's recommendations. This is step 4. The respondent, the General Counsel, or the complainant can file "exceptions" to an ALJ's recommendation as it pertains to the facts, the law, or the proposed remedy. Cases heard by the Board are assigned on a rotating basis by the Executive Secretary, generally to three-member panels. In more complex, novel, or potentially precedent-setting cases, the full five-member Board decides the case. After examining the transcript of the ALJ hearing, any exhibits, and the exceptions filed, the majority of the three to five members deciding the case determines the Board decision and order. Except very infrequently, there is no oral hearing involving the parties themselves.

The fifth step is taken when either the losing party wants to appeal the Board decision or the NLRB seeks enforcement of its decision and order. The losing party may appeal the

Board decision and order to the Circuit Courts of Appeal. Again there is no hearing; the courts base their decisions upon the transcripts of the Board and the hearing before the ALJ. The court may dismiss or affirm the Board's decision and order in full or in part, or it may send the case back to the Board for reconsideration based on the court's conclusion that additional weight should be given to certain facts or principles of law. Such remanded cases are then examined again by the Board. The Board's subsequent decision and order is also subject to appeal to the circuit courts.

Board orders are not self-enforcing and some defendants ignore them or fail to comply fully. A compliance officer with the regional office is assigned to check with the charging party about 60 days after the order is made to see if the respondent has complied. If the respondent has not, the General Counsel seeks enforcement of the Board order in the courts of appeal. Once granted enforcement, if the respondent fails to comply, he finds himself in an unwanted position known as contempt of court. The losing party to the Circuit Court decision may subsequently appeal to the Supreme Court. This rarely occurs and the high court typically renders no more than a handful of such decisions in any given year.

In summary, the normal channel for resolving ULP disputes begins with a ULP charge, which is handled informally with the purpose of securing informal settlements in meritorious charges. Meritorious charges not resolved informally then become formal complaints that are first heard by an ALJ, which can be appealed to the Board, the Circuit Courts of Appeal and finally to the Supreme Court. Of special relevance to first-contract negotiations is the handling of technical refusals to bargain and discriminatory discharges. We briefly discuss these next.

In those cases where the employer commits a "technical" violation of his duty to bargain in good faith, the regional office can petition for a "summary judgement" that bypasses the hearing before an ALJ (step 3). The petition or motion goes directly to the Board for consideration. In most cases the Board merely affirms its earlier decision or that of

the Regional Director with regard to the objections made in the representation proceedings. Once this summary judgment has been made, the employer can proceed with his appeal to the circuit courts.

Where the regional office finds that employees have been discriminatorily discharged, the standard remedy is reinstatement and/or make-whole back pay award. As will be discussed in chapter 4, a large proportion of 8(a)(3) violations are settled informally. The settlement includes some amount of back pay but reinstatement is often waived, either because the employer will not voluntarily rehire the employee or the employee is not willing to return. The back pay award deducts from the lost earnings (plus interest) any earnings accumulated during the period of illegal discharge. In some cases, even earnings that would likely have been made had the discharged employee looked more intensively for reemployment are deductible. Subsequent to a Board order (and generally after court enforcement), if the employer contends that the calculation of the back pay award is erroneous on some grounds and the parties cannot settle the dispute, then the Regional Director orders a "back pay specification hearing." This hearing is held before an ALJ and the ALJ decision can be contested as in any other ULP complaint.

## A Profile of NLRB Activities

Let us now draw a profile of NLRB activities in which we examine non-neutral Board decisionmaking, the growing representation and ULP case load, the stages at which ULPs are resolved and associated delays, and statistics pertinent to the resolution of objections and challenges to elections.

One of the major criticisms of the NLRB is presidential "stacking" of the Board. Presidential administrations change and new appointments to the Board typically reflect

the pro-union or pro-management predilections of these administrations. Studies by Gross (1981) and Scher (1961) have documented this appointment process covering the Wagner Act era and the Eisenhower administration. The recent flurry of attention being given to President Reagan's appointments to the Board seems to indicate that the same flawed process is alive and well. A recent empirical investigation by Cooke and Gautschi (1982) of Board member decisions involving novel and precedent-setting cases over the 1954-1977 period gives strong support to the notion that Board member decisions are often biased. Based on a probability model of Board member voting behavior, the authors report that Democrats appointed by Democratic presidents were substantially more likely to favor union positions (either as complainants or respondents) in ULP cases than were Republicans appointed by Republican presidents by as much as 32 percentage points.

There are of course several negative consequences associated with oscillation in Board policy as the Board changes its political makeup.

> First, inconsistency and ambiguity in interpreting legal and factual parameters in ULP cases impede stable labor-management relations. Neither party can clearly judge the appropriateness of the other party's actions. Consequently, unions and management alike are more inclined to seek both Board review of ALJ decisions and court review of Board decisions. The long delay associated with adjudicating labor-management conflicts can only exacerbate ongoing conflicts. In addition, inconsistency and ambiguity reduce the certainty that a party's practices will be deemed unlawful. As a consequence, both unions and employers are less inclined to act in good faith and resolve their own disputes. (Cooke and Gautschi, 1982, p. 549)

With respect to the issue of first-contract negotiation success, the historical evidence of biased decisionmaking portends fewer decisions from the Reagan Board that favor union positions regarding objections and challenges, refusal to bargain complaints, and discriminatory discharge complaints.

Also important to our understanding of life at the NLRB is an examination of the enormous caseload of representation election decisions and ULP charges. Table 2-1 reports the caseload for certification elections conducted and ULPs resolved over the 1950-1981 period. In fiscal year 1981 (the latest published figures available), the NLRB conducted about 6,700 certification elections involving over 350,000 eligible voters and processed more than 31,000 ULP charges against employers and nearly 12,000 ULP charges against unions. Since 1950 the number of ULP charges processed has risen seven-and-one-half fold and certification elections have risen about 20 percent.

Finally, there are no published data indicating the outcome of charges against employers or unions. However, part of the story can be told by examining the proportion of cases withdrawn or dismissed. In 1981, of the 29,351 ULP charges against employers (which were closed), 33 percent were withdrawn and 32 percent were dismissed. Of the 11,116 charges against unions (excluding union jurisdictional disputes which are rarely withdrawn or dismissed), 34 percent were withdrawn and 41 percent were dismissed. Hence, at least in the initial stages of the NLRB process, some 65 percent of charges against employers lacked merit, while some 75 percent of charges against unions lacked merit in 1981. That differential in the proportion of meritorious cases (as defined) against unions and employers was wider during 1980 and 1981 than at any other time. However, except for 1960, a larger proportion of charges against employers were found meritorious than charges against unions. The reader may also find it interesting to note that the upshot in ULPs

**Table 2-1**
**NLRB Certification Election and ULP Caseload, 1950-1981**

| Year | Number of elections | Eligible workers | Total ULP | ULP charges against employers | Merit* rating | ULP charges against unions | Merit rating |
|---|---|---|---|---|---|---|---|
| 1950 | 5,605 | 888,287 | 5,809 | 4,472 | NA | 1,337 | NA |
| 1955 | 4,003 | 515,995 | 5,507 | 4,362 | 24% | 1,145 | 23% |
| 1960 | 6,021 | 483,964 | 11,331 | 7,723 | 24% | 3,608 | 29% |
| 1965 | 7,176 | 531,971 | 15,744 | 10,931 | 36% | 4,813 | 30% |
| 1970 | 7,426 | 588,214 | 20,931 | 13,601 | 34% | 7,330 | 31% |
| 1975 | 7,729 | 545,103 | 31,073 | 20,311 | 30% | 10,762 | 25% |
| 1980 | 7,296 | 478,821 | 43,844 | 31,281 | 36% | 12,563 | 26% |
| 1981 | 6,656 | 352,903 | 43,155 | 31,273 | 35% | 11,882 | 25% |

SOURCE: Columns 1 and 2 are from table 11, columns 3, 4, and 6 from table 2, columns 5 and 7 from table 7 or 8, various annual reports of the NLRB. *Annual Report of the National Labor Relations Board*, U.S. Government Printing Office, Washington, DC.

*Percent of charges either resulting in formal complaints or settled prior to issuance of formal complaints.

filed has not been accompanied by a lower proportion of meritorious charges. This would suggest that over time both employers and unions have either become more willing to commit ULPs or that employers, unions, and employees have found greater reason or need to become more litigious.

Table 2-2 provides statistics on the flow and disposition of ULP cases as they work their way through the stages of the NLRB dispute resolution procedure. It is important to note that the vast majority of cases (84 percent in 1981) of ULP charges are resolved informally. It took a median of 44 days per case to informally resolve approximately 35,000 charges filed. It has been pointed out by many observers of the NLRB that without such a successful record, the whole NLRB apparatus would very likely fold under the weight of so many charges filed. However, as a word of caution against too much optimistic praise, there has yet to be any research on the impact of these dismissals, recommended withdrawals, or settlements upon subsequent labor-management relationships. We must question if indeed these resolutions have effectuated well the purposes of the NLRA.

Another 12 percent of charges filed and closed in 1981 were settled prior to ALJ decisions. Of the 1,583 cases heard by ALJs, only about 20 percent were resolved at this step; in all other cases, exceptions were filed by losing parties. Of the 1,264 closed cases decided by the Board, about 29 percent reached the circuit courts. Approximately 67 percent of Board decisions were fully affirmed, 15 percent were set aside, and the remaining cases were modified or remanded (in part or in full). Of the 362 cases decided by the circuit courts, 54 were appealed to the Supreme Court. The high Court, however, only ruled in two cases. Of the two cases decided by the Supreme Court, one was affirmed in full and one was set aside.

As one can imagine, there is considerable delay in reaching settlements and decisions. In 1981 (see table 2-3), it took a median of 173 days from the date a formal complaint was issued to the completion of a hearing before an ALJ. It took

at the median another 139 days for ALJs to issue their findings and recommendations. Finally, it took 120 more days at the median to obtain a Board decision and order. All in all, from the filing of charges to Board decisions it took a median delay of 490 days in cases closed in 1981. We do not have published data on the amount of delay that was added for those more than 350 Board decisions heard before the courts of appeal. As a rule-of-thumb, however, such litigation takes an average of one year or better.

**Table 2-2**
**Methods of Disposition of ULP Cases, 1981**

| Stage | Cases | Percent* |
|---|---|---|
| 1. Charges Filed | | |
| Pending | 20,974 | -- |
| Closed | 41,020 | 100.0 |
| 2. Before Issuance of Complaint | | |
| Withdrawn | 13,478 | 32.9 |
| Dismissed | 14,102 | 34.4 |
| Settled | 6,777 | 16.5 |
| 3. Settled after Complaint and before ALJ Decision | 5,080 | 12.3 |
| 4. After ALJ Decision (no exceptions filed) | 319 | 0.008 |
| 5. After Board Ruling | 902 | 0.022 |
| 6. After Circuit Court Ruling | 308 | 0.008 |
| 7. After Supreme Court Action | 54 | 0.001 |

SOURCE: *Annual Report of NLRB*, 1981, tables 1A, 7, and 8.

*Percent based on cases closed.

Table 2-3
Time Elapsed by Stage of ULP Procedure, 1981

| Stage | Median days |
|---|---|
| A. Cases Closed | |
| 1. Filing of charge to issuance of complaint | 44 |
| 2. Complaint issued to close of hearing | 173 |
| 3. Close of hearing to issuance of ALJ decision | 139 |
| 4. ALJ decision to issuance of Board decision | 120 |
| 5. Total days from filing of charge to issuance of Board decision | 490 |

SOURCE: *Annual Report of NLRB, 1981, table 23.*

Table 2-4 provides a historical sketch of Section 8(a)(3) charges and related remedial settlements or Board orders. Since 1950 there has been a near sixfold increase in annual 8(a)(3) charges brought before the NLRB, reaching nearly 18,000 in 1981. Given that over the 1950-1981 period there has only been a 20 percent increase in the number of certification elections, a nearly 60 percent drop in total eligible voters (from 888,287 in 1950 to 352,903 in 1981), and that roughly 90 percent of all 8(a)(3) violations occur during union organizing and first-contract negotiations, the dramatic increase in 8(a)(3) charges has been simply astonishing. Also, as reported in table 2-4, there has been a greater than elevenfold increase in the number of employees receiving back pay from employers. In 1981 alone, nearly 26,000 employees received back pay, the total awards amounting to over $36 million.

Of those 25,631 workers receiving back pay in 1981, 6,463 were offered reinstatement and 3,373 were placed on preferential hiring lists only. Of those offered reinstatement, 78 percent were apparently willing to accept reinstatement. Unfortunately, data are not available to indicate what proportion of those placed on preferential hiring lists actually

## Table 2-4
## Discriminatory Discharge Complaints and Remedial Action, 1950-1981

| Year | 8(a)(3) charges[a] | Reinstatement[b] cases | Preferential[c] hiring cases | Back pay cases | Employees offered reinstatement | Employees accepting reinstatement | Employees declining reinstatement | Employees preferential hiring lists | Employees receiving back pay |
|---|---|---|---|---|---|---|---|---|---|
| 1950 | 3,213 | NA | 108 | NA | 2,111 | NA | NA | NA | 2,239 |
| 1955 | 3,089 | NA | 45 | NA | 721 | NA | NA | NA | 1,171 |
| 1960 | 6,044 | NA | 90 | NA | 1,885 | NA | NA | NA | 3,110 |
| 1965 | 7,367 | 1,122 | 152 | 1,467 | 5,875 | 5,081 | 794 | 644 | 4,477 |
| 1970 | 9,290 | 952 | 110 | 1,658 | 3,779 | 2,723 | 1,056 | 628 | 6,679 |
| 1975 | 13,426 | 1,532 | 91 | 2,249 | 3,816 | 2,608 | 1,208 | 480 | 6,948 |
| 1980 | 18,315 | 2,851 | 998 | 3,984 | 10,033 | 8,952 | 1,081 | 3,915 | 15,566 |
| 1981 | 17,571 | 2,322 | 750 | 3,776 | 6,463 | 5,025 | 1,438 | 3,373 | 23,631 |

SOURCE: From various annual reports of the NLRB. See selected years of *Annual Report of the National Labor Regulations Board*, generally Tables 2 and 4.

a. Not all 8(a)(3) charges involve a discharge, but rather involve some other form of discrimination related to promotions, transfers, scheduling, or pay. As reported above it appears that over 90 percent of 8(a)(3) violations involve a discharge. The figures presented include any ULP charge in which an 8(a)(3) violation was charged even if other ULP charges were filed simultaneously.

b. Number of cases in which reinstatement was *offered*.

c. Number of cases in which complainants were placed on preferential hiring lists but not necessarily rehired.

got reinstated. Based on Stephens and Chaney's (1974) study of illegally discharged employees placed on preferential hiring lists, however, only 58 percent are eventually rehired.

As discussed above, unions and employers may object to campaign conduct or challenge ballots at election time. In fiscal year 1981, the NLRB closed (i.e., ended all decision-making on) 6,656 certification elections in which 1,110 objections were filed. In 16.8 percent of certification elections, objections were filed—41 percent of these by employers, 57 percent by unions, and 2 percent by both parties. Of the 1,110 total, 337 objections were withdrawn and 613 were overruled by the NLRB. Consequently, only 16.5 percent of all objections were found meritorious by the NLRB. Given our interest in first-contract negotiation outcomes, we might ask whether or not employers are filing objections at a higher rate today than in the recent past. As reported in table 2-5, there has been a steady increase of nearly threefold in the rate of filings since 1965 (no published statistics are available prior to 1965). In 1965, only 5.7 percent of elections won by unions (and closed during that year) resulted in employer objections. By 1981, over 15 percent of all elections won were accompanied by employer objections. Moreover, as a proportion of total objections filed, employer objections accounted for only 26 percent in 1965 but rose to 41 percent in 1981. Unfortunately, we have no statistics on what proportion of these objections were found meritorious. Nor can we attribute the increase to an increasing intention among employers to delay bargaining obligations, given the possibility that unions may have become more willing to commit objectionable behavior.

As previously reviewed, the NLRB has authority to set aside election results where either party acts sufficiently badly during the election campaign. The NLRB may either order the election rerun or, in cases where employer campaign behavior was egregious, the Board may simply order the employer to bargain in good faith—sometimes without holding any election. Table 2-6 reports the number of rerun

elections and bargaining orders over the 1965-1981 period. Of the 6,656 certification elections closed in 1981, only 147 were rerun elections, a sharp increase over the 79 rerun elections in 1979 but 22 percent fewer than held in 1965. Only 30 percent of rerun elections in 1981 resulted in union victories, which is quite low in comparison to the union victory rate of 47 percent in 1975.

**Table 2-5**
**Employer Objections to Closed Certification Elections Won by Unions, 1965-1981**

| Year | Won elections | Employer objections | Ratio of objections to elections |
|---|---|---|---|
| 1965 | 4,608 | 261 | 5.7 |
| 1970 | 4,367 | 368 | 8.4 |
| 1975 | 4,001 | 471 | 11.8 |
| 1980 | 3,498 | 503 | 14.4 |
| 1981 | 3,019 | 455 | 15.1 |

SOURCE: *Annual Report of NLRB,* selected years, tables 11A and 11C.

**Table 2-6**
**Certification Election Reruns and Gissel-type Bargaining Orders 1965-1981**

| | | | Bargaining orders | |
|---|---|---|---|---|
| Year | Reruns | Percent won by unions | Elections set aside | No election held |
| 1965 | 188 | 43.6 | 11 | 124 |
| 1970 | 195 | 41.1 | 19 | 48 |
| 1975 | 172 | 47.1 | 14 | 41 |
| 1979 | 79 | 30.3 | 14 | 39 |
| 1981 | 147 | 29.9 | NA | NA |

SOURCES: Columns 1 and 2 are taken from table 11 of various *Annual Reports of the NLRB.* Columns 3 and 4 are taken from a memorandum from Robert Volger to John Van de Water of the NLRB, 9/14/81.

According to unpublished NLRB records, only 14 Gissel-type bargaining orders were made in 1979 following union defeats at the polls. As reported in table 2-6, there has been little variation in the number of such bargaining orders over the 1965-1979 period. In an additional 39 instances in 1979, the Board ordered employers to negotiate in good faith with unions where no elections were ever held. Based on a 1982 poll by the AFL-CIO of its affiliated unions which secured Gissel-type bargaining orders during 1979, it is reported that only 28 percent of the 40 bargaining orders resulted in first contracts. Based on this limited evidence it would appear, therefore, that a bargaining order is hardly an adequate remedy for egregious employer campaign conduct.

Finally, one tactic of recalcitrant employers who have lost elections to unions or have been ordered to bargain by the Board is simply to refuse to bargain in good faith. As discussed, those Section 8(a)(5) violations can entail technical refusals to bargain or surface bargaining. In fiscal year 1981, there were over 9,800 refusal-to-bargain charges brought against employers. This compares to only 913 brought against unions (Section 8(3)(b) charges). There has been a greater than sevenfold increase in refusal-to-bargain charges against employers since 1950 and a greater than five-fold increase of like charges against unions since 1950.[15] We do not know what proportion of 8(a)(5) charges are associated with first-contract negotiations. However, one could reasonably surmise that the reported rate of increase in refusal-to-bargain charges is just as likely to be associated with first-contract negotiations as they are with contract renewals (if not more so).

## Conclusion

The NLRB handles an enormous case load—some 43,000 ULP charges and 12,500 representation questions and disputes in 1981 alone. There are 33 regional offices and 19 assorted subregional offices scattered across the U.S. at which this case load begins and in which the great majority of cases are resolved either through dismissals, withdrawals,

formal and informal settlements, or at Regional Director discretion. ALJs issued decisions in over 1,200 disputes during 1981. The five-member Board issued decisions in over 1,000 contested ULP complaints, over 500 contested representation issues, and in more than 1,000 other uncontested cases and labor-management disputes. Furthermore, some 360 NLRB cases were brought before the circuit courts for enforcement and another 252 were appealed by losing parties.[16] In fact, it is worth noting that the NLRB was involved in more litigation in the courts of appeal than any other federal administrative agency.

The resolution of ULP charges and election campaign disputes takes a long time, especially those reaching the Board and courts of appeal. To the chagrin of many, the old saw that "justice delayed is justice denied" has very real meaning in labor-management disputes over union organizing. Delays in resolving employer objections and refusals to bargain are bound to frustrate union efforts and rights to translate election victories into satisfactory contracts, a hypothesis to be tested in the following chapter. Discriminatory discharges have risen to an unprecedented level in the post-Wagner Act period, even perhaps to a greater extent than in the pre-Wagner Act period. The impact of illegal discharges upon election outcomes and first-contract negotiation outcomes has heretofore been untested. In the following chapter we examine the impact of NLRB procedural delays in resolving objections and challenges to elections, discriminatory discharges, and refusals to bargain upon first-contract negotiation outcomes.

## NOTES

1. The following sources may be consulted for further elaboration upon the NLRB's structure and operational procedures. *NLRB Rules and Regulations and Statements of Procedure*, Series 8, as amended. (Washington, DC: U.S. Government Printing Office, 1979). *NLRB Casehandling Manual*, Part One, Unfair Labor Practice Proceedings (April 1975), as amended; Part Two, Representational Proceedings (October 1975), as amended; and Part Three, Compliance Proceedings

(August 1977), as amended (Washington, DC: U.S. Government Printing Office). Also see Kenneth C. McGuiness. *How to Take a Case Before the National Labor Relations Board,* 4th edition (Washington, DC: Bureau of National Affairs, Inc., 1976).

2. See *Departments of Labor and Health, Education, and Welfare Appropriations for 1979,* House of Representatives, ninety-fifth Congress, second session (Washington, DC: G.P.O., 1978), submission of John S. Irving, General Counsel, NLRB, p. 761.

3. *General Shoe Corporation,* 77 NLRB 124 (1948).

4. This doctrine was established in *Peerless Plywood Co.,* 107 NLRB 427 (1953).

5. *Hollywood Ceramics,* 140 NLRB 221 (1962).

6. *Shopping Kart Food Market, Inc.,* 228 NLRB 190 (1977).

7. *General Knit of California,* 239 NLRB No. 101 (1978).

8. *Midland National Life Insurance Co.,* 236 NLRB No. 24 (1982).

9. Farber shows through a review of Congressional hearings and NLRB and court decisions that the Act intended that there be no right to appeal objections or challenges beyond the Board. Consequently, obtaining court review of objections or challenges through refusing to bargain is an unintended loophole in the Act. See Farber, 1984, pp. 276-277.

10. *NLRB v. Gissel Packing,* 395 U.S. 575 (1969).

11. *NLRB v. Borg-Warner Corp., Wooster Div.,* 356 U.S. 342 (1958).

12. *H. K. Porter Company v. NLRB,* 397 U.S. 99 (1970).

13. *NLRB v. General Electric Co.,* 418 F. (2d) 736 (1969).

14. Given that in recent years we have witnessed an unprecedented wave of union concessions in mature bargaining relationships, we might find that the Board and/or courts have become less insistent upon improving compensation and benefits as a sign of good faith bargaining. I have no evidence that this has or has not become the case, however.

15. See table 2, various issues of the *Annual Report of the National Labor Relations Board,* U.S. Government Printing Office, Washington, DC.

16. Forty-sixth *Annual Report of the National Labor Relations Board,* U.S. Government Printing Office, Washington, DC, 1981, pp. 20-23.

# Chapter 3

# An Empirical Investigation of First-Contract Negotiation Outcomes

## Introduction

The extent of union representation in the private sector has been steadily declining over the last three decades. As a percent of the nonagricultural labor force, union membership dropped from a high of 35 percent in 1955 to only 21 percent by 1980.[1] There has been much written in recent years attempting to explain this decline.[2] Among the more popular explanations are the following: (1) a changing labor force which, for a variety of reasons, has become less interested in traditional union representation; (2) a decline in the manufacturing sector which, since the passage of the Wagner Act, has been the heartland of union organizing; (3) the expansion of government protections in the workplace which have reduced the need for union representation; (4) reduced union organizing efforts by national unions; (5) improved human resource management practices that have eliminated many of the conditions that spur union organizing; and (6) stepped-up employer resistance to unionization.

Much of the loss in the degree of union representation is tied to the reduction in the number of employees voting for

union representation in certification elections. In 1950, for example, unions won about 75 percent of all certification elections, but by 1981 they were winning only 45 percent.[3] Moreover, as previously reported in table 2-1, the number of eligible voters in certification elections in 1981 was only 40 percent of the total eligible in elections held in 1950. Recent analyses of the factors that help explain the declining election success indicate that greater employer resistance (partly effectuated through NLRB procedural delays in conducting elections) plays a significant role.[4] To date, however, no research has been published showing a direct relationship between discriminatory discharges and election outcomes, albeit the circumstantial evidence strongly suggests this is a very important factor.

Although there has been considerable research about union growth and representation election outcomes, no study of the factors that explain the failure of unions to obtain first contracts can be found in the literature. Prosten (1979) of the AFL-CIO reported in 1978, however, that approximately 22 percent of first-contract negotiations fail to result in agreements between unions and employers.[5] The present investigation likewise finds that unions lose 23-28 percent of their bids for first-contract agreements. We do not, unfortunately, have statistics to examine whether or not the failing of unions to get first contracts has been on the rise. But given that not until the mid-1970s was this problem publicized by unions, it is very likely that it only became a serious problem in the last decade. Thus it would appear that one important factor in the decline in union representation has become the inability of unions to secure contracts subsequent to winning certification elections.

The lack of systematic research about the causes for failure to obtain first contracts has not, however, been coupled with idle concern by the union movement. Indeed, as part of the 1977 Labor Reform Bill, unions sought to

amend the NLRA with several provisions pertinent to first-contract negotiations. These included expedited NLRB procedures, self-enforcing NLRB orders, make-whole remedies for refusal to bargain, and mandatory injunctions and double back pay claims against employers for illegally discharging union activists. Although the reform bill was defeated in the U.S. Senate (by filibuster) in 1978, the same public policy issues surrounding first-contract negotiations remain important issues today.[6] In chapter 4, the provisions of the 1977 Labor Reform Bill are reviewed and evaluated.

The heart of the problem according to the union leaders is unnecessary procedural delays. For instance, Prosten concludes:

> . . . in most situations . . . the absence of an agreement reflected an employer who had exploited the weaknesses of the National Labor Relations Act to frustrate the results of the election. Typically the employer had dragged the process out long enough to decimate the union's majority. (Prosten, 1979, p. 247)

Clearly, employers who elect to use delay as a tactical maneuver to chip away at union support subsequent to the election have numerous avenues under the NLRA to delay good faith bargaining. By filing objections and challenges to elections, by refusing to bargain until court review of union certifications, and by surface or shadow bargaining until compelled by the court system to negotiate, employers can stall negotiations literally for years. A second and often concurrent means of diminishing union strength is through discriminatory discharges of union activists.

In order to examine the impact of NLRB procedural delays, discriminatory discharges, and other salient factors upon first-contract negotiation outcomes, a theoretical model is presented of the factors that come into play in negotiating first contracts. There are, of course, factors other than those related to the law and NLRB procedures

that help determine the outcome of first-contract negotiations, though the latter factors are shown to be most important. After laying out the general theoretical framework for our analysis, a set of testable hypotheses are developed which are tested against two samples of first-contract negotiation outcomes: one from the state of Indiana and one nationwide.[7] The Indiana based sample was designed to collect data about NLRB (Region 25) handling of objections and challenges to election results, refusal to bargain, and discriminatory discharge, as well as more detailed information about firm-to-industry wage ratios and local labor market factors. The nationwide sample was compiled in order to gain greater generalizability of the findings and to examine the impact of southern sentiment toward union representation, so-called right-to-work laws, and national union organizational features upon first-contract negotiations outcomes. Due to differences in data collection between the two samples, several hypotheses are either testable against only one sample or specified differently across samples. These differences are described later in the chapter.

## Theory

The understanding of what factors help determine the likelihood that a union will successfully negotiate a first contract can be theoretically viewed in terms of relative power. The greater the relative power of the union vis-a-vis the employer, the higher the probability that an agreement will be reached. In defining relative power, we can begin with Chamberlain's explanation of relative bargaining power.

> [I]f the cost to B of disagreeing on A's terms is greater than the cost of agreeing on A's terms, while the cost to A of disagreeing on B's terms is less than the cost of agreeing on B's terms, then A's bargaining power is greater than that of B. (Chamberlain, 1951, p. 221)

Based on Chamberlain's definition, it can be maintained that if management can convince the union that management's

cost to agreeing to a contract are greater than management's costs to disagreeing to a contract and, simultaneously, the union perceives that its costs to demanding a contract (i.e., disagreeing) are greater than its cost of foregoing a first contract (i.e., agreeing), then the union will not obtain the first contract.

Chamberlain's definition does not provide us, however, with a larger picture of the factors that influence the costs of agreeing and disagreeing. For that broader understanding of relative power, we turn to the following (Cooke 1985) model:

$$\text{relative power}_i = f\left(\text{cost of rules}_j^{-1}, \frac{\text{sources of power}_i}{\text{sources of power}_j}, \frac{\text{bargaining skills}_i}{\text{bargaining skills}_j}\right)$$

Before briefly describing each component of the relative power function, it is important to note a general theoretical assumption. In general terms, it is assumed throughout that the majority of workers involved in first-contract negotiations seek greater control over the work rules that govern their employment and that employers resist such added control. The set of work rules primarily includes (1) the substance of rules (e.g., the type and magnitude of wages and benefits and layoff criteria) and (2) procedures followed in the application of substantive rules.

The first component of the relative power function maintains that the relative power of party i decreases as the cost of work rules to party j increase. In the context of first-contract negotiations, the less costly the demands of the union in changing the work rules, the more likely it will succeed in obtaining a first contract. The cost of the new rules to the employer is not only a function of the absolute size of the demand but is also a function of the ability of the employer to absorb or pass along increased labor costs to consumers and the perceived nonpecuniary costs employers associate with managing in unionized contexts. For example, (everything

else the same) a union demanding a $1 increase in compensation per hour is less likely to obtain the first contract than a union demanding only a 25 cent increase in compensation per hour. In the first instance the employer will resist more because added labor costs will have more of an effect on current profits or on product price and hence future profits. Where employers differ with respect to profitability and/or the ability to pass along costs to consumers, the cost of a $1 increase in hourly compensation varies; and, consequently, the ability of unions to obtain first contracts varies across employers.

Additionally, the cost of unionization to employers appears to vary according to perceived nonpecuniary costs. For instance, some managers perceive a greater loss of status than other managers as a given level of control over work rules is relinquished to workers and their representatives. Consequently, employer resistance to negotiating first contracts appears to vary beyond that attributable to differences in pecuniary costs.

The second component of the relative power function holds that as the sources of power available to party i to force its demands on party j increase (relative to the sources of power available to j to reject the demands of i), the relative power of i increases. The sources of power available to the parties are derived from the economic, sociopolitical, and technical environments of the employer and from organizational features of the employer and union.

The economic environment reflects at any given point in time the supply and demand conditions of the employer's product and labor markets. Cyclical activity, for example, acts as a temporal influence upon either party's relative power. The sociopolitical environment affects relative power as public sentiment, laws, regulatory policies and procedures, and court decisions favor the bargaining stance of either party. Several important facets of the technical en-

vironment that impact upon relative power include the substitutability of capital for labor, the continuous nature of the production or service process, and the technically strategic position of work units within the production or service process. Finally, certain features of organizations enhance the relative power of either party and/or certain groups within organizations. Of particular importance are the organizational structure, group cohesiveness, and organizational resources of employers and unions.

The third component of the relative power function depicts the bargaining skills of the parties. It is this component that envelops the process of exchange about work rule preferences and where tactical maneuvers are utilized in ways that capitalize on the subjective nature inherent in the assessment of the sources of power and the costs in the relative power function. In short, as the bargaining skills of party i increase relative to party j, the relative power of party i increases. The appropriate use of a strike or strike threat, for example, is a form of negotiating skill (a tactic) used to alter the subjective perceptions of employers about the added labor costs associated with new contracts and about the perceived sources of power available to both parties.

The above theoretical framework of relative power is used next to establish testable hypotheses about first-contract negotiation outcomes. In short, we seek to specify models that include variables reflecting important aspects of the components of the relative power function.

## Hypotheses

The focus of our investigation is upon whether or not the union involved in negotiations obtained a contract. Assuming that workers are utility maximizers, the study of whether or not a union obtains a contract examines two outcomes: (1) a minimally acceptable (or better) agreement is obtained,

or (2) a minimally acceptable agreement is not obtained. The latter outcome implies that union leaders and/or members abandoned their efforts to obtain a contract, presumably because the costs of obtaining a contract ultimately outweighed the minimally acceptable terms and conditions (i.e., benefits) sought. The hypotheses developed below follow the theoretical model, but as constrained by limitations in data collection.

(a) Costs

From the first component of the relative power function, it is argued that as the cost to management of the proposed contract increases, the relative power of the union decreases. No estimates of the pecuniary costs of demands by the unions in these first-contract negotiations were made, however. It would be empirically impossible in the present context to collect the information needed to calculate the increased labor costs to employers of (1) the contract (where contracts were obtained), or (2) of the last contract demands (where contracts were not obtained). Nor was it possible to estimate the nonpecuniary costs employers associated with union representation. It is possible, however, to test two hypotheses that proxy the theoretical notion that added labor costs influence the likelihood that unions obtain first contracts.

First, conventional thinking indicates that unions pay close attention to existing wage and benefit packages negotiated throughout the given industry (and sometimes beyond) (Kochan, 1980, pp. 214-217). Hence, in first-contract negotiations, we can expect unions to bargain for the union wage and benefit standard. The level of resistance by employers to such demands is a function of how close firm wages and benefits are to the union standard. It is hypothesized that the higher the firm-to-industry wage-benefit ratio, the smaller the expected increase in labor costs attributable to signing first contracts and, consequently, the greater the probability that unions obtain first contracts.

Second, it is hypothesized that employers who have existing union contracts incur lower costs in adding new work units than employers having no current union contracts. When a union organizes an additional work unit of the employer who has an existing contract with the union, the existing contract is typically applied to the added work unit or is simply modified or supplemented by terms specifically applicable to the new unit. The transactional costs of sitting down and negotiating a new contract, therefore, are avoided or at least reduced. As another explanation of lower costs, the perceived loss of status to managers associated with union representation where no union representation currently exists is likely to be greater on average than where union representation already exists. (Besides capturing the transactional and nonpecuniary costs of negotiating first contracts, having an existing contract covering other work units is an organizational source of power to unions. This hypothesis is developed below.)

(b) Sources of Power

*Economic Environment.* An important factor of the economic environment of any negotiations is cyclical activity in the employer's product and labor markets. Economic research to date generally maintains and finds statistical support for the notion that during downswings employers are more resistant to and successful in blocking union initiatives at the bargaining table than during upswings (Ashenfelter and Pencavel, 1969). It is usually hypothesized that employers are in a better position to thwart strike activity during downswings because (1) product demand is down and inventories are up, and (2) the rising supply of labor increases the availability of substitute labor. With respect to first-contract negotiations, therefore, the relative power of employers to resist the added costs of a contract increases during downswings. However, the reduction of alternative employment associated with cyclical downswings is likely to increase the desire of the work unit to negotiate the first con-

tract. The logic behind this competing hypothesis rests with the fact that a majority of workers in the certification election unit are dissatisfied enough with the existing set of work rules to vote for union representation as a means of changing the existing rules. Because the opportunities to find better jobs outside the given firm are reduced during cyclical downswings, the dissatisfied majority is more likely to persist in attaining its common goals of changing work rules. This hypothesis is consistent with Cooke's (1983) hypothesis and statistical findings that workers voting in union certification elections are more likely to vote for union representation as unemployment rises. It may be valuable to the reader to point out that in the study of first-contract negotiations (like that of certification elections), the analysis of outcomes is a conditional probability—conditioned on the fact that an election was held and that first contract negotiations were pursued (i.e., the election was won by the union).

In large part, wage competition in the labor market is determined by supply and demand conditions in local labor markets—especially for nonmanagerial and nonprofessional workers. Employers will not want to pay wages above the going local rate; they do not have to in order to attract workers. Consequently, the higher the firm-to-local wage rate ratio, the more willing is the employer to incur a strike since he is better able to replace his current labor force at his going wage rate. It is hypothesized, therefore, that the probability of obtaining an agreement is negatively related to the firm-to-local market wage ratio.[8]

*Sociopolitical Environment.* Public sentiment toward the perceived social consequences of union representation partially determines the relative power of unions. In localities and during periods where union representation is perceived less favorably than in general, the relative power of unions declines. A frequently maintained presumption is that southern communities are less favorably disposed toward

unions than elsewhere, which effectively reduces union organizing success. Although the results of empirical investigations remain mixed with regard to the impact of southern inhospitality upon union growth and election outcomes, no studies have examined the possible negative effect upon first-contract negotiation success. That hypothesis is examined herein.

As a second dimension of the sociopolitical environment, right-to-work or "free rider" laws are hypothesized to reduce the probability that unions obtain first contracts. Given that the NLRA mandates that unions represent all workers in the recognized bargaining unit, unions generally seek union security clauses in agreements. These clauses typically require that all workers in the bargaining unit join the union and/or pay representation fees as a condition of continued employment. Providing free services to "free riders" is clearly at variance with union objectives. It is not the purpose of the present study to debate the issue of whether or not workers *ought* to be compelled to join unions or pay representation fees when a majority of workers win representation rights. Instead, it is important to understand a union's greater reluctance to battle employers over first contracts when union security clauses are prohibited. Thus, it is hypothesized that, *ceteris paribus,* in states that prohibit union security clauses, unions are more reluctant to invest resources and time in obtaining first contracts than in states without such laws and, hence, are less likely to obtain first contracts.

NLRB policies, procedures, and practices in the resolution of election disputes and employer ULPs are also expected to impact upon first-contract negotiation outcomes. It is the NLRB regulation of union-management relations that Prosten (1979) reports to be a major stumbling block for union organizing because the procedures of the NLRB invariably bolster any employer resistance. The basic crux of the prob-

lem faced by unions is the delay associated with the resolution of objections, challenges, and ULP complaints of refusal-to-bargain. The greater the delay between (1) the date of the election victory and (2) the date for which all objections, challenges, and ULP complaints are resolved (and the employer is ordered to bargain in good faith), the greater the opportunities for the employer to chip away at worker cohesiveness and union resources. Theoretically, the relative power of unions is diminished as a consequence of greater delay and hence the probability of successfully negotiating the contract is likewise reduced.

We test the hypothesis that delay in the resolution of objections and challenges to the election reduces the probability that unions obtain first contracts. We also test the hypotheses that refusal-to-bargain and illegal discrimination against union activists, likewise, reduce the chances of unions to secure first contracts. Refusal to bargain augments delay and discrimination (section 8(a)(3) violations) reduces the cohesiveness of the work unit due to implicit threats of further discrimination, especially the threat of discharge.

*Technical Environment.* There are at least three important facets of the technical environment that determine whether workers or managers are more likely to increase or reduce their relative power positions. First, the greater the substitutability of capital (e.g., robots) for labor, the greater management's relative power over unions, and conversely. Second, the more continuous the nature of production (e.g., plastics production in comparison to small batch machine tooling), the greater management's relative power vis-a-vis the union, and conversely. And, third, the more vulnerable the production or service process is to disruption by selected work units, the greater the relative bargaining power of those work units over management.

Because of the difficulty in obtaining information about the technical environment of the work units involved in each observation of first-contract negotiations, measures or prox-

ies for this source of power are absent from the empirical models below. It seems reasonable to assume, however, that the features of the technical environment noted above, which could be hypothesized to affect the relative power of the parties, are largely independent of the variables included in the models. Consequently, the inferences drawn from the tests will be unbiased with respect to the classical omitted variable problem.

*Organizational Features.* The final source of power envelops organizational features of firms and unions. Several organizational features are hypothesized to impact upon first-contract negotiations. First, the greater the support among the work unit for union representation, the more weight a strike threat carries at the bargaining table. Discriminatory discharges subsequent to union election victories are, for instance, more effective when the union enjoys only a slim majority of worker support. Furthermore, since first-contract negotiations typically take months, turnover (voluntary and involuntary) among workers within the new bargaining unit is likely to reduce the majority support. Here, delay between election date and closing date by the NLRB increases the probability that union support will decline. In short, the less cohesive the work unit in its bid for a contract, the less likely a first contract will be obtained.

Worker cohesiveness is also a function of what gets negotiated at the bargaining table. Having elected to bargain collectively in order to gain greater control over the full set of work rules, workers establish and seek to obtain work rules that reflect their common interests. When union representatives negotiate rules that are at variance with the priorities and immediate interests of the newly formed membership, organizational cohesiveness during negotiations is diminished. As affiliates of national union organizations, local unions have varying degrees of autonomy in negotiating work rules. National organizations that require approval of contract provisions, for example, obviously place some restrictions upon negotiable terms and conditions of employment. It is hypothesized that (everything else the

same), the probability of obtaining contracts is reduced where national unions must approve local agreements.

A second feature of the union organization is the level of resources available to negotiate first contracts. Local unions, for instance, that can draw upon financial support in the case of a strike and/or negotiation expertise from national union organizations increase their organizational source of power. Employers who know that national organizations are prepared to support locals with strike monies are likely to give greater weight to implicit or explicit strike threats (which is hypothesized to increase the relative power of local unions). In addition, the larger the work unit, the more likely national union organizations make resources available to affiliated locals and local union organizations allocate resources for first-contract negotiations. Such a decision rule is a function of both the gain to union membership and expected servicing costs. Since there are fixed costs to both negotiations and the servicing of contracts, the larger the work unit involved, the greater the net average return on resources spent by unions.

Finally, where unions have existing contracts covering other work units, the probability of obtaining a first contract is enhanced. In addition to reducing the cost to the employer, an existing contract increases the organizational sources of power of the unions, which can call upon the covered work unit(s) to support a threatened or actual strike.

(c) Negotiation Skills.

The final component of the relative power function implies that as the negotiation skills of union representatives increase, the relative power of the union increases. Precise estimates of union and management negotiation skills would be empirically intractable in the present study. As a rough proxy for this dimension of the relative power function, however, it is hypothesized that union negotiation skills are greater in first-contract negotiations when national union representatives participate in negotiations. This assumes that

negotiators from national unions are more experienced and thus more effective at the bargaining table (on average) than local union negotiators. In addition to bringing greater expertise to the table, the national representative is likely to reflect a commitment by the national organization to allocate resources to the local toward securing the first contract.

Striking and threatening to strike over first contracts is theoretically a tactic of negotiations. Negotiators who use the strike or threat-of-strike more skillfully invariably increase the relative power of the union.[9] Empirically estimating the impact of strikes and strike threats upon negotiation outcomes is problematic. Strike threats are as much implicit in the subtle give-and-take of negotiations as they are explicit. Creating accurate measures of strike threats would be quite difficult on one hand and well beyond the scope of the present study on the other hand. Although data on the incidence of strikes has been collected in the present investigation, treating strikes as an independent variable in the present model would be quite misleading. Generally speaking, a strike only occurs when the threat of a strike fails. Any statistical comparison of negotiation outcomes where strikes do and do not occur cannot tell us what the true impact of strikes is upon securing agreements since successful strike threats would be sufficient in many (if not most) cases in securing contracts.

## Data Collection

### (a) Indiana Sample

The first step of the data collection was to identify all union certification election victories during 1979-1980 in Indiana within NLRB Region 25. These victories were identified from NLRB representation election files provided by the NLRB on magnetic tape. In the second step, the selected

cases were then matched with Region 25 unpublished records. Those records included names and addresses of employers and local union representatives, election and certification dates, data about objections and challenges to the elections, and data about subsequent unfair labor practice complaints. Using the names and addresses recorded, (1) a short survey instrument was used to collect information from union representatives and (2) unpublished data about firm wages (described below) were collected from the Indiana Employment Security Commission. The survey to union representatives asked whether a contract was obtained and several questions about duration of negotiations, the utilization of national representatives and mediators during negotiations, other work units under contract with the given employer, strike activity, and business closures. (See Appendix, Item 1.) A 93 percent response rate was obtained after two mailings of the survey and repeated follow-up telephone calls.

According to NLRB data files, unions won 137 certification elections in 1979-1980 in Indiana, NLRB Region 25. Of these 137 observations, 2 were excluded because published files were incorrect with respect to year of election and name of union. Three local unions could not be contacted by mail or phone and six other local union representatives failed to respond to the survey instrument. Finally, six other observations had missing data on one or more independent variable and two observations were still in negotiations. The final sample included 118 observations.

(b) Nationwide Sample

A sample of first-contract negotiations was selected from NLRB union certification election records for 1979 and 1980. A random sample of 500 union certification election victories was initially selected. The only restriction placed on the sampling was the requirement that unions involved were reported by the NLRB as AFL-CIO affiliates. This restric-

tion was made in order to facilitate the subsequent collection of data—in short, because the research department of the AFL-CIO agreed to match union victories with appropriate representatives of each national union involved in the elections (generally the research directors of national organizations). The restriction of the sample to AFL-CIO affiliates biases the sample against the experience of smaller (typically local) independent unions and the International Brotherhood of Teamsters.[10]

In the second step in the data collection, national union representatives identified by the AFL-CIO were asked for assistance. Assistance came in the form of the national union representative either (a) directly gathering the requested data from local representatives or (b) providing names and addresses of regional or local representatives involved directly in the negotiations. Where names were provided, survey instruments were mailed directly to those representatives. (See Appendix, Item 2.) A follow-up survey was mailed to nonrespondents. Telephone calls were subsequently made to nonrespondents and answers were sought during telephone conversations. Of the 59 national unions involved in the survey, no response was obtained after repeated requests from national representatives of 22 unions.

Of the initially selected 500 cases, the following cases were subsequently dropped from the sample:

1. 32 cases that could not be matched with AFL-CIO affiliated national unions (and no questionnaires were mailed),
2. 27 cases for which unions reported having no record of the selected elections,
3. 7 cases in which unions reported that selected elections were either decertification or unit clarification elections,
4. 6 cases where first-contract negotiations were still being negotiated,

5. 5 cases in which unions reported that selected certification elections were lost, and
6. 5 responses that could not be matched with the sample or were incomplete.

Of the remaining 418 cases, responses were obtained covering 140 negotiations.

## Model Specification

Because of anticipated difficulties in collecting data and limited resources for that collection, two samples of data were compiled (as reported above). Thus, not all the hypotheses established were testable solely against either sample, although the empirical specifications are reasonably similar. In order to facilitate the discussion of the empirical specification of the models by simple algebraic statements, descriptions of the models are given first, followed by explanations of specification. This is done separately for the Indiana and nationwide samples.

In both sample specifications the dependent variable (CONTRACT) is dichotomous: equal to 1 when a contract is obtained, and equal to 0 when a contract is not obtained. An appropriate estimator for the present inquiry is the cumulative logistic probability function which takes the form,

$$\text{CONTRACT} = \frac{1}{1 + e^{-(\alpha + \beta_i X)}}$$

estimated by maximum likelihood. X is a vector of independent variables discussed below, and $\beta$ is a vector of logit coefficients.

(a) Specification: Indiana Sample

The following equation is estimated:

$$CONTRACT_i = a + b_i\ FIRM\$/IND\$_i + b_2\ OTHCONT_i + b_3\ UNEMP_i + b_4\ FIRM\$/LOCAL\$_i + b_5\ OBJDELAY_i + b_6\ ULPS + b_7\ ln(SIZE \bullet PCVOTE_i) + b_8\ NATREP_i$$

where CONTRACT = 1 when contract obtained, 0 otherwise

FIRM$/IND$ = (firm average annual wage/3-digit SIC average annual wage in Indiana) x 100

OTHCONT = 1 when another contract with given union is present, 0 otherwise

UNEMP = county unemployment rate (x 100)

FIRM$/LOCAL$ = (firm average annual wage/county average annual wage) x 100

OBJDELAY = days between election date and date when NLRB regional office closed union certification procedure[11]

ULPS = 1 if union files a meritorious ULP complaint against employer for refusal to bargain and/or for discriminatory discharge, 0 otherwise

ln(SIZE•PCVOTE) = natural log (size of unit multipled by percent vote for union representation (x 100))

NATREP = 1 if a representative from the national union participated in negotiations, 0 otherwise

In alternative specifications, the following variables are employed:

HIND$ = 1 when FIRM$/IND$ is ≥ 25 percent above the mean ratio

HILOCAL$ = 1 when FIRM$/LOCAL$ is ≥ 25 percent above the mean ratio

DISCDIS = 1 if meritorious ULP complaint of discriminatory discharge was made, 0 otherwise

REFUSE = 1 if meritorious ULP complaint of refusal-to-bargain was made, 0 otherwise

BOTHULPS = 1 if meritorious ULP complaints of discriminatory discharge *and* refusal-to-bargain were made, 0 otherwise

To test the first hypothesis concerning the costs of the first contract to the employer, we calculate the ratio of the average annual wage of the firm prior to the year of the election victory (1979-1980) to the annual average wage of the 3-digit SIC industry (in Indiana) of the firm during the same year. Wage data were obtained from the Indiana Employment Security Division, Research and Statistics Section. The annual average wage for the firm was calculated by dividing total annual wages by average annual employment.[12] Annual average wages for 3-digit SIC industries were calculated by multiplying the average annual weekly wage by 52. This ratio (call it FIRM$/IND$) suffers from measurement error in that firm averages are based on both salaried and non-salaried employee earnings, while industry averages are based on production worker earnings. Obviously, inferences about the size of the estimated coefficients will be potentially seriously biased. Measurement error is also likely to produce inefficient estimates, increasing the chances of wrongly finding no significant statistical support for the hypothesis. As an alternative specification, I construct a dummy variable (HIND$) equal to 1 when FIRM$/IND$ is $\geq$ 25 percent above the mean estimated ratio, and 0 otherwise. Under this specification, we still could obtain seriously biased estimates of the magnitude of the relationship between high relative wages and CONTRACT, but we would reduce the chances of finding no statistically significant relationship where in fact one exists.

The second variable related in part to the costs of the first contract to the employer is whether or not the union had an existing contract with the employer covering other workers. It was also hypothesized that having an existing contract reflects an organizational source of power to the union. To test the hypothesis that an existing contract is positively related to obtaining first-contracts, we create a dummy variable OTHCONT, equal to 1 if the union had an existing contract and equal to 0 otherwise.

The second component of the relative power function states that as the sources of power to the union are greater, the probability of obtaining first contracts is higher. To test the hypothesis that cyclical market conditions influence first-contract negotiation outcomes, the county unemployment rate enters the models. County statistics are utilized because these rates are readily available and they would appear to roughly approximate the surrounding labor market of firms within the county. (Of course measurement error is present, especially where firms are located on the perimeter of county boundary lines.) Because the predicted relationship is ambiguous, a two-tailed test is made.

To construct a variable depicting the relative wage of the firm vis-a-vis the local market wage, the firm average annual wage (discussed above) is divided by the annual average wage of production workers in the county for which the firm is located. (This ratio is called FIRM$/LOCAL$.) The same measurement error problems are encountered here as in the construction of FIRM$/IND$. Because of the probability of generating biased and inefficient estimates, the dummy variable HILOCAL$ was constructed. HILOCAL$ equals 1 when FIRM$/LOCAL$ is $\geq$ 25 percent above the mean estimated ratio, and otherwise equals 0. In the case of either variable, a negative relationship is predicted.

As an important sociopolitical variable, the delay between election date and the date the employer is obligated to begin good faith bargaining is hypothesized to be negatively related to the probability of obtaining first contracts. The tests below measure the days between election date and the date for which the NLRB regional office closed the certification election case (OBJDELAY). This closing date, however, includes only the time elapsed to resolve objections and challenges through the five-member Board. It does not include additional delays associated with ULP complaints of refusal-to-bargain or discrimination. To test the impact of refusal-to-bargain and discrimination upon contract negotiation outcomes, data concerning ULP complaints were col-

lected from the NLRB regional office (Region 25). The type and date of complaint, its disposition (dismissed, withdrawn, settled), and whether or not a hearing was held were recorded. From these data, the variable ULPS is constructed. Whenever an 8(a)(5) or 8(a)(3) complaint was deemed meritorious by the regional office and resulted in a hearing before an administrative law judge or was settled prior to a hearing, ULPS is set to 1, but otherwise is set to 0. Either type of complaint was considered timely for present purposes when it was filed subsequent to the election victory but within one year of the given election victory or before a contract was signed (when this date was provided by survey respondents). By restricting the variable ULPS to complaints which lead to a hearing or were settled without a hearing, ULPS should depict reasonably well illegal employer activities.

As an alternative specification, ULPS is dropped and three separate dummy variables enter the model. These variables depict (1) whether or not a meritorious discrimination complaint was filed (DISCRIM), (2) whether or not a meritorious refusal-to-bargain complaint was filed (REFUSE), and (3) whether or not meritorious complaints were filed against the employer for both discrimination and refusal-to-bargain (BOTHULPS). This alternative specification allows us to look more closely at the separate effect of discrimination and refusal-to-bargain upon negotiation outcomes.

Two organizational features were hypothesized to influence negotiation outcomes: cohesiveness and size of bargaining unit. Cohesiveness is measured in the model by the proportion of workers who voted for union representation in the certification election. It is hypothesized that the larger the proportion of workers voting for representation, the greater the cohesiveness of the work unit in securing the first contract, and, consequently, the greater the probability of obtaining a contract. It was also hypothesized that the larger the size of the unit, the greater the resources spent by the union in securing a contract, which in turn increases the

probability of obtaining the first contract. But as shown in previous research, size of unit and percent vote for union representation are highly and negatively correlated.[13] In the present sample, the simple zero order correlation is -.33. Given a small sample, substantial collinearity problems are likely to arise. As an alternative specification which avoids the inherent collinearity problem, an interaction term is calculated based on size and percent vote for representation. The interaction term tests the hypothesis that contracts are more likely to be obtained when the bargaining unit is larger and more cohesive. The variable ln(SIZE•PCVOTE) is calculated by multiplying the size of the unit by the percent voting for representation. The natural log of the variable is taken in the belief that beyond some multiplication of size and cohesiveness, positive but decreasing marginal gains are realized.

Finally, as one proxy of the role of negotiation skills upon first contract negotiation outcomes, a dummy variable is employed to indicate whether or not a representative from the national organization participated in the negotiations (NATREP). The variable equals 1 when a national representative participated in negotiations, and 0 otherwise. As noted above, NATREP is also likely to pick up an organizational source of power, namely, the increased support of the national organization.

(b) Specification: Nationwide Sample

The empirical specification of the model tested against the nationwide sample is:

$$\text{CONTRACT}_i = a_i + b_1\,\text{OTHCONT}_i + b_2\,\text{UNEMP}_i + b_3\,\text{SOUTH•RTW}_i + b_4\,\text{ULPS}_i + b_5\,\text{APPROVE}_i + b_6\,\ln(\text{SIZE•PCVOTE})_i + b_7\,\text{NATREP}_i$$

where CONTRACT = 1 when contract is obtained, 0 otherwise

OTHCONT = 1 when another contract with given union is present, 0 otherwise

UNEMP = state annual unemployment rate (x 100) during year of negotiations

| | |
|---|---|
| SOUTH•RTW | = 1 if state in which negotiations were held was in the South and in state with right-to-work law, 0 otherwise |
| ULPS | = 1 if union filed meritorious ULP complaint(s) during negotiation period, 0 otherwise |
| APPROVE | = 1 if contract demands and/or agreements require approval by the national union, 0 otherwise |
| ln(SIZE•PCVOTE) | = natural log (size of unit multiplied by percent vote for union representation (x 100)) |
| NATREP | = 1 if a representative from the national union participated in negotiations, 0 otherwise |

The variables OTHCONT, ln(SIZE•PCVOTE), and NATREP are identical to those employed in the Indiana sample specification, whereas in place of the county rate, UNEMP is the annual state average unemployment rate. With these exceptions, the remaining variables need explanation.

In order to avoid drawing spurious conclusions due to high collinearity, the hypotheses that southern communities and right-to-work laws diminish union power in negotiating first contracts are combined.[14] Instead of two separate variables, therefore, the variable SOUTH•RTW is used, which is a dummy variable equal to 1 if the state in which negotiations were held was in the South and had a right-to-work law.

Specification of the dummy variable ULPS (equal to 1 if the union filed a meritorious complaint during the negotiation period and 0 otherwise) is taken from answers to a question in the survey of union representatives. Respondents were asked if any ULP complaints associated with negotiations were filed with the NLRB. If ULP complaints were made, respondents were asked to describe the complaints and NLRB decisions. Verification of these answers by examination of NLRB records would be prohibitive in the present sample. (Of the responses indicating that unions filed ULP complaints, 19 failed to describe NLRB decisions of merit and are included in the benchmark of ULPS.)

Several organizational features of national unions were hypothesized to impact upon the probability of obtaining first contracts. A survey of national representatives, however, indicates that all organizations provide negotiation expertise either (a) upon request from local unions or (b) in those cases where national representatives were involved in the certification election campaigns and no requests were necessarily made by locals. Furthermore, the survey finds that in roughly 90 percent of the sample, national unions regularly provide strike monies to locals in first-contract negotiations. Hence, no tests of these policies and practices are made herein. The survey indicates, on the other hand, that in 62 percent of the sample, national organizations required approval of first-contract demands and/or agreements by local unions. As a test of the hypothesis that approval reduces the probability of reaching agreements, the dummy variable APPROVE enters the model.[15]

## Test Results

Descriptive statistics and data sources about the variables in the models are reported in tables 3-1 and 3-2. A higher proportion of negotiations failed to result in contracts in the nationwide sample (28 percent) than in the Indiana sample (23 percent). The lower success rate in the nationwide sample may be attributable to the variable SOUTH•RTW, as explained below. Other differences between samples are also apparent. In the Indiana sample, in only 14 percent of the cases did unions have separate existing contracts with employers, but 21 percent did in the nationwide sample. The unemployment rates range from 4.4-16.6 percent in the Indiana sample and 2.8-9.7 percent in the nationwide sample. This difference reflects the aggregation effect of using state unemployment rates and relatively higher levels of unemployment in Indiana during 1979-1980. Using NLRB Region 25 records it was found that employers illegally discharged employees and/or refused to bargain (ULPS) in

Table 3-1
Descriptive Statistics and Data Sources: Indiana Sample

| Variable | Sample proportion or mean | Standard deviation | Range | Source (full citation below) |
|---|---|---|---|---|
| CONTRACT | .77 | - | 0 or 1 | Union Survey |
| FIRM$/IND$ | 105.85 | 36.87 | 49.3 - 239.3 | IESD |
| HIND$ | .24 | - | 0 or 1 | IESD |
| OTHCONT | .14 | - | 0 or 1 | Union Survey |
| UNEMP | 7.69 | 2.36 | 4.4 - 16.6 | IESD |
| FIRM$/LOCAL$ | 102.20 | 33.64 | 31.1 - 198.3 | IESD |
| HILOCAL$ | .19 | - | 0 or 1 | IESD |
| OBJDELAY | 38.44 | 69.88 | 0 - 365 | NLRB, Region 25 |
| ULPS | .23 | - | 0 or 1 | NLRB, Region 25 |
| DISCRIM | .11 | - | 0 or 1 | NLRB, Region 25 |
| REFUSE | .07 | - | 0 or 1 | NLRB, Region 25 |
| BOTHULPS | .05 | - | 0 or 1 | NLRB, Region 25 |
| ln(SIZE•PCVOTE) | 7.20 | .99 | 5.3 - 9.8 | NLRB Magnetic Tape |
| NATREP | .33 | - | 0 or 1 | Union Survey |

SOURCES: (1) Union Survey: mail and telephone survey, June 1 - October 1, 1982. (2) IESD: data made available by the Indiana Employment Security Division, Statistics and Research Section, Indianapolis. (3) NLRB, Region 25: data made available by regional office, NLRB, Region 25, Indianapolis. (4) NLRB Magnetic Tape: magnetic tape containing all elections conducted by the NLRB since 1972, Data Systems Branch, NLRB, Washington, DC.

**Table 3-2**
**Descriptive Statistics and Data Sources: Nationwide Sample**

| Variable | Sample proportion or mean | Standard deviation | Range | Source (full citation below) |
|---|---|---|---|---|
| CONTRACT | .72 | - | 0 or 1 | Survey, 1 |
| OTHCONT | .21 | - | 0 or 1 | Survey, 1 |
| UNEMP | 6.46 | 1.30 | 2.8 - 9.7 | *Statistical Abstract of the U.S.* *Handbook of Labor Statistics* |
| SOUTH•RTW | .14 | - | 0 or 1 | Survey, 1 |
| ULPS | .11 | - | 0 or 1 | Survey, 1 |
| ln(SIZE•PCVOTE) | 7.57 | 1.20 | 5.3 - 11.1 | NLRB Magnetic Tape |
| APPROVE | .62 | - | 0 or 1 | Survey, 2 |
| NATREP | .49 | - | 0 or 1 | Survey, 1 |

SOURCES: (1) Survey, 1: mail and telephone survey described in Section IV, B above, February-June, 1983. (2) *Statistical Abstract of the United States: 1982-83*, U.S. Bureau of the Census (Washington, DC: U.S. Government Printing Office, 1982), 103d edition, p. 393. (3) *Handbook of Labor Statistics*, Department of Labor, Bureau of Labor Statistics, Bulletin 2070 (Washington, DC: U.S. Government Printing Office, 1980), Tables 45 and 166, pp. 92 and 414. (4) NLRB Magnetic Tape: magnetic tape containing all elections conducted by the NLRB since 1972, Data Systems Branch, NLRB, Washington, DC. (5) Survey 2: mail and telephone survey of research directors and other representatives of national unions, February-June 1983.

23 percent of the cases in the Indiana sample, whereas, only 11 percent is reported by union representatives in the nationwide sample. However, if the 19 cases in which no explanation of NLRB decisions was given were added to the 11 percent figure, then 25 percent of the nationwide sample would entail ULPs.

If we examine the two components of the variable ln(SIZE•PCVOTE), we find that the average percent voting for union representation (PCVOTE) is 76 percent in each sample. However, the average unit size (SIZE) in the nationwide sample is roughly twice that of the Indiana sample; 60 and 33, respectively. Finally, survey responses indicate that in the nationwide sample, national union representatives participated in nearly one-half of first-contract negotiations whereas they participated in one-third of negotiations in the Indiana sample.

The estimated partial derivatives of CONTRACT with respect to each variable, evaluated at the sample mean probability of obtaining a contract, are reported in tables 3-3 and 3-4.

As reported in column 1 of table 3-3, the firm-to-industry wage ratio (FIRM$/IND$) is positive as hypothesized but insignificant at conventional levels of confidence. However, when the ratio enters the model as a dummy variable depicting high firm-to-industry wages (HIND$), significance is found at the $\leq .05$ level. Thus, support is found for the hypothesis that firms that pay higher wages vis-a-vis the industry incur lower increased labor costs (which increases the union's power to negotiate first contracts).

A positive relationship between the variable OTHCONT and CONTRACT is obtained in both samples. In the nationwide sample the estimate suggests that having an existing contract increases the probability of obtaining an additional contract (or extended coverage) by as much as 46 percentage

**Table 3-3**
**Estimates of the Determinants of First-Contract Negotiation Outcomes, Indiana Sample**
(t-values in parentheses)

| Variable | Model 1 coefficient | Model 2 coefficient | Model 3 coefficient |
|---|---|---|---|
| FIRM$/IND$ | .0016 | - | - |
| | (1.070) | | |
| HIND$ | - | .2528** | .2690** |
| | | (1.960) | (22.039) |
| OTHCONT | .1237 | .1442 | .1460 |
| | (0.801) | (0.871) | (0.788) |
| UNEMP | .0313 | .0390* | .0350 |
| | (1.497) | (1.829) | (1.584) |
| FIRM$/LOCAL$ | -.0007 | - | - |
| | (0.448) | | |
| HILOCAL$ | - | -.0850 | -.0811 |
| | | (0.666) | (0.619) |
| OBJDELAY | -.0013** | -.0012** | -.0011** |
| | (2.094) | (1.920) | (1.769) |
| ULPS | -.3190*** | -.3510*** | - |
| | (3.025) | (3.183) | |
| DISCRIM | - | - | -.4372*** |
| | | | (3.099) |
| REFUSE | - | - | -.2498* |
| | | | (1.519) |
| BOTHULPS | - | - | -.2936* |
| | | | (1.555) |
| ln(SIZE•PCVOTE) | .1332** | .1450*** | .1472*** |
| | (2.204) | (2.351) | (2.392) |
| NATREP | .1527 | .1640* | .1724* |
| | (1.268) | (1.343) | (1.375) |
| INTERCEPT | -.9523* | -1.031** | -1.0320** |
| | (1.853) | (2.189) | (2.185) |
| N | 118 | 118 | 118 |
| (-2)log likelihood ratio | 100.28 | 97.11 | 95.98 |

The coefficients reported above are the partial derivatives of CONTRACT with respect to each variable evaluated at the mean ($\overline{\text{CONTRACT}}$); calculated by $\beta\ \overline{\text{CONTRACT}}\ (1-\overline{\text{CONTRACT}})$ where $\overline{\text{CONTRACT}} = .77$.

* Significant at ≤ .10 level.
** Significant at ≤ .05 level.
*** Significant at ≤ .01 level.

points (significant at greater than .01 level). The point estimate is much lower in the Indiana sample (roughly 14 percentage points) and is insignificant. Given that OTHCONT is highly unlikely to suffer from measurement error, we might reconsider the hypotheses underlying the variables in order to explain the insignificant results in the Indiana sample. One might conjecture that instead of perceived costs being lower to employers with existing contracts (due to lower transactional costs and supposed lower nonpecuniary costs), perceived costs might actually be higher in some circumstances. Perceived higher costs may be attributable to poor existing union-management relationships and/or a common belief that the relative power of unions increases substantially with additional union coverage of the firm's workforce. Under such perceptions, employers can be expected to be more resistant. Therefore, although unions can expect existing covered work units to support them in their bid to add another work unit, stepped-up employer resistance may neutralize this organizational source of power.

Mixed and insignificant results are found with respect to the impact of unemployment upon reaching agreements. Positive signs are obtained in the Indiana sample but a negative sign is obtained in the nationwide sample. Statistical significance is reached only in model 2 as tested against the Indiana sample and here it is limited to the $\leq .10$ level (using 2-tailed tests). These mixed results could be attributable to differences in the aggregation of unemployment rates for which state unemployment rates are less suitable. However, the results also suggest that unemployment can have both positive and negative effects as hypothesized.

As a second variable of the economic environment, the relationship between the firm's wage and the local wage has the expected effect. Although the negative signs on FIRM/LOCAL$ and HILOCAL$ are consistent with the

hypothesis that employers are more resistant the higher their wages vis-a-vis local labor market wages, the results are insignificant at conventional levels of significance.[16]

**Table 3-4**
**Estimates of the Determinants of First-Contract Negotiation Outcomes Nationwide Sample**
**(t-values in parentheses)**

| Variable | Coefficients |
|---|---|
| OTHCONT | .462*** |
| | (2.765) |
| UNEMP | -.049 |
| | (1.326) |
| SOUTH•RTW | -.282** |
| | (2.170) |
| ULPS | -.344*** |
| | (2.672) |
| ln(SIZE•PCVOTE) | -.016 |
| | (0.367) |
| APPROVE | -.140* |
| | (1.465) |
| NATREP | .267*** |
| | (2.788) |
| INTERCEPT | .634 |
| | (1.327) |
| N | 140 |
| (-2)log likelihood ratio | 134.51 |

The coefficients reported above are the partial derivatives of CONTRACT with respect to each variable evaluated at the mean ($\overline{\text{CONTRACT}}$); calculated by $\beta$ ($\overline{\text{CONTRACT}}$)(1-$\overline{\text{CONTRACT}}$), where $\overline{\text{CONTRACT}} = .72$.

* Significant at ≤ .10 level.
** Significant at ≤ .05 level.
*** Significant at ≤ .01 level.

The variable SOUTH•RTW (tested only in the nationwide sample) appears to have a substantial impact upon reducing the probability of reaching agreements. The point estimate (significant at ≤ .05 level) indicates that the probability of success is reduced by 28 percentage points in those 14 percent

of negotiations held in southern states with right-to-work laws. In a separate equation, dummy variables for SOUTH and RTW were examined additively in place of SOUTH•RTW, but neither variable reaches conventional levels of statistical significance.

Several variables associated with NLRB resolution of union-management conflicts are examined. NLRB procedural delay (OBJDELAY) is, as anticipated, negatively related to CONTRACT in the Indiana sample and is significant at the ≤ .05 level. The estimated magnitude of the relationship indicates that, on average, every one month delay between election date and NLRB close date of objections and challenges to election outcomes reduces the probability of obtaining an agreement by as much as 4 percentage points. This figure strongly suggests, therefore, that delay, which gives employers more time to reduce majority support and/or diminish union resources is a dominant factor in the failure of unions to obtain first contracts.

The second NLRB-related variable (ULPS) is also negatively and highly significantly related to CONTRACT (in both samples). Those employers who refused to bargain in good faith and/or illegally discharged union activists, reduced the probability of unions successfully negotiating contracts by 32-36 percentage points. When ULPS is divided into DISCRIM, REFUSE, and BOTHULPS (in the Indiana sample) it is found that all three categories of ULPS are significantly and negatively related to CONTRACT. A highly robust finding is that discriminatory treatment has a profound negative impact upon the probability of obtaining first contracts. Indeed, DISCRIM reduces the probability of reaching an agreement by nearly 44 percentage points! (Significant at ≤ .01 level.) Refusal-to-bargain (REFUSE) appears to reduce the probability of obtaining a contract by as much as 25 percentage points, significant at ≤ .10 level. In those 5 percent of first-contract negotiations where the employer refuses to bargain and in addition discriminates against union activists (BOTHULPS), the probability of ob-

taining an agreement is reduced approximately 30 percentage points. Consequently, the added delay gained via refusal-to-bargain and the implicit threat of additional discrimination, apparently have severe negative effects on the relative bargaining power of unions.

The interaction of the size of the unit and the level of majority support for union representation (ln(SIZE•PCVOTE)) yields mixed results. In the Indiana sample the variable reaches significance at $\leq .05$ level in all equations and is positively related to CONTRACT. Thus, the larger the unit and the larger the percent of workers voting for representation, the greater the probability of obtaining a contract. For example, the difference in the probability of obtaining a contract is approximately 25 percentage points between (a) a unit of 25 workers where the majority vote was 55 percent and (b) a unit of 100 workers where the majority vote was 75 percent. It can be inferred that as important sources of power at the bargaining table, greater organizational resources applied to larger units and broader group cohesiveness increase the relative power of unions in first-contract negotiations.

In the nationwide sample, however, ln(SIZE•PCVOTE) carries a negative sign, albeit the estimate is insignificant. Given the results of the estimate in the Indiana sample and the unexpected negative sign, the variable is examined further. As reported in table 3-5, once the model is estimated with SIZE and PCVOTE separately, positive signs are obtained for both variables; yet the results remain insignificant. As an alternative measure of cohesiveness of the group, we could examine the percent vote for union representation in light of voter participation in the election. Presuming that workers not participating in the election are indifferent to union representation, it can be reasonably argued that the smaller the proportion of the total work unit voting for representation, the less cohesive and, hence, less successful are prounion workers in obtaining first contracts. This hypothesis is tested using the following ratio: workers voting

for union representation/(workers voting for or against representation + workers not voting). Call this ratio PCVOTE2. As reported in table 3-5, PCVOTE2 is positive and significant at the ≤ .05 level. The point estimate indicates that on average every increase of 10 percentage points increases the probability of reaching agreement by approximately 7 percentage points. Therefore it appears that the lower the level of participation in certification elections, the less likely unions are able to demand contracts.

SIZE, on the other hand, remains insignificant. Respecification of the model using the interaction of SIZE and PCVOTE2 (ln(SIZE•PCVOTE2)) also yields the unanticipated negative sign, although the estimate remains insignificant. The persistent negative sign (given positive signs on both SIZE and PCVOTE2) suggests two possible statistical problems that are being encountered. First, some important omitted variable which is highly correlated with ln(SIZE•PCVOTE2) but negatively correlated with CONTRACT may be swamping the true effect of ln(SIZE•PCVOTE2). Second, the interaction of SIZE and PCVOTE2 may not mirror well the imposed linear functional form of that interaction. Further analyses of the determinants of first-contract negotiation outcomes will hopefully unravel the unexpected results of the relationship between the interaction of SIZE and PCVOTE2 with CONTRACT as found in the present nationwide sample.

As an additional organizational factor, the variable APPROVE was added to the model tested against the nationwide sample. As hypothesized, it appears that national unions that require approval of agreements reduce the probability of obtaining first contracts. The variable APPROVE carries the expected negative sign and reaches significance at ≤ .10 level. The point estimate suggests that on average the probability of obtaining a contract is reduced by as much as 14 percentage points.

**Table 3-5**
**Estimates of SIZE, PCVOTE, and PCVOTE2**
**Nationwide Sample**
**(t-values in parentheses)**

| Variable | Coefficients | Coefficients |
|---|---|---|
| SIZE | .0002 | .0003 |
| | (0.376) | (0.591) |
| PCVOTE | .003 | – |
| | (1.214) | |
| PCVOTE2 | – | .007** |
| | | (1.860) |
| OTHCONT | .466*** | .436** |
| | (2.828) | (2.162) |
| UNEMP | -.048 | -.054 |
| | (0.303) | -(1.414) |
| SOUTH•RTW | -.323*** | -.319*** |
| | (2.443) | (2.403) |
| ULPS | -.337*** | .281** |
| | (2.654) | (2.090) |
| APPROVE | -.116 | -.125* |
| | (1.198) | (1.286) |
| NATREP | .266*** | .253*** |
| | (2.800) | (2.637) |
| INTERCEPT | .225 | .109 |
| | (0.631) | (0.314) |
| N | 140 | 140 |
| (-2)log likelihood ratio | 133.21 | 130.98 |

The coefficients reported above are the partial derivatives of CONTRACT with respect to each variable evaluated at the mean ($\overline{CONTRACT}$); calculated by $\beta$ ($\overline{CONTRACT}$) (1-$\overline{CONTRACT}$), where $\overline{CONTRACT}$ = .72.

* Significant at ≤ .10 level.
** Significant at ≤ .05 level.
*** Significant at ≤ .01 level.

Finally, the participation of representatives from national unions (NATREP) is positively and significantly associated with the probability of obtaining first contracts. In the Indiana sample the point estimates across equations indicates

that on average the probability of obtaining first contracts rises by 16 percentage points. In the nationwide sample the highly significant coefficient suggests that participation of a national representative enhances the probability by as much as 27 percentage points. These results strongly support the hypothesis that the negotiation expertise of national representatives (and concurrently the signal to employers that national organization resources are available to local unions) can be an important factor in winning first contracts.

## Conclusions

Evidence found in the present study indicates that unions fail to obtain first contracts following 1 of every 4 union certification victories. Obviously, this is a disturbing figure both to workers seeking union representation and to unions allocating resources to organizing and negotiations. The figure suggests that even after a majority of workers elect to bargain collectively, employer resistance to union representation is widespread and effective in keeping unions out of the workplace.

Empirical support is found for the hypotheses that high firm-to-industry wage ratios, greater worker cohesiveness, larger work units, the existence of other union contracts with employers, and participation by national union representatives increase the probability of agreement. In contrast, it is found that negotiations held in southern states with right-to-work laws and national union approval of local agreements reduce the probability of agreement. Furthermore, NLRB delays in the resolution of employer objections and challenges to election results, the refusal-to-bargain in good faith and discrimination subsequent to election victories have profound effects upon reducing the probability of agreement.

Respondents to the two sample surveys were also asked what they believed were the greatest barriers to successfully negotiating contracts. Answers ranged from general statements to specific elaborations upon given cases. Most answers can be categorized as being related to the law, employer attitudes and practices, union internal weaknesses, and specific contractual demands. Nineteen of the respondents raised the issue of inadequate NLRB enforcement of employer violations of the NLRA. Employer practices that topped the list were various forms of bad faith bargaining (and in particular, stalling tactics) and the hiring of outside ("union-busting") consultants. Eighteen respondents listed the former and twelve listed the latter practice. Employer attitudes were also widely cited: 18 encountered obvious antiunion hostilities and 17 found employers lacking an understanding and/or an acceptance of the role of unions in changing the terms and conditions of employment. In 11 cases respondents attributed negotiation difficulties to a lack of work group cohesiveness. Sometimes work units were not willing to strike, others expected too much from first contracts, and in other work units turnover played an important role.

Among specific contract issues, the following appeared to cause the greatest difficulties in reaching agreement: 27 respondents cited union security and dues check-off provisions, 17 cited wages, 14 cited various fringe benefits, 14 cited seniority provisions, and 7 cited hours of work scheduling. Numerous other barriers were also listed, including, for example: racial conflict, economic conditions, grievance and arbitration provisions, and one inexperienced negotiator admitted having "made some mistakes" during negotiations.

Two questions pertinent to the above list of negotiation hurdles were asked in the nationwide survey. First, the survey asked whether or not a union security clause was written into the agreement. It was reported that, except for agreements negotiated in right-to-work states, security provi-

sions were won in 93 percent of the negotiations. Following the suggestion of one national union representative, the second wave of questionnaires included a question asking respondents whether or not the employer used outside consultants during the negotiation period. Of the 78 useable responses to this question, 49 respondents reported that consultants were used. Of the 29 cases in which no outside consultants were used, unions failed to obtain contracts in 17 percent of negotiations. In stark contrast, of the 49 cases in which consultants were reportedly used, unions failed to obtain contracts in 41 percent of negotiations. It would appear, therefore, that employers who used outside consultants markedly reduced the probability of reaching agreements.[17]

Besides losing the right to bargain collectively subsequent to winning certification elections, a sizeable number of workers lose their jobs due to business closures. That is, some employers simply go out of business or close down selected operations before signing an agreement or shortly after reaching agreement. Even though it is beyond the intended scope of this research to "explain" these closure decisions, it is worth noting that more than 6 percent of employers closed their doors before contracts were signed and another 9 percent closed their doors subsequent to signing contracts. Some of these closures are obviously unrelated to unionization per se. Some employers would have gone out of business regardless of union election victories. Indeed, one can imagine that workers employed by firms facing threatening market conditions may turn to union representation as a potential means of providing a more democratic way of determining lay-off selection and other job security decisions. Increased labor costs are also likely to drive some marginally competitive employers out of business. However, conventional wisdom suggests that some strongly antiunion employers simply refuse to operate in union environments no matter what may be the economic decision to close operations. Of course, the present study cannot ferret out the degree to which antiunion animus governs what typically

would be an economic decision to close operations. But the circumstantial evidence that approximately 6 percent of employers close their doors prior to signing agreements strongly implies that anitunion animus is a significant factor?

The analysis of the role of strikes in securing first contracts does not fit well in the present empirical context. Strikes, however, are fairly frequent in the present sample; just over 23 percent of the negotiations in the Indiana sample and over 16 percent in the nationwide sample resulted in strikes. Of those negotiations resulting in agreement, 24 percent were accompanied by strikes, and of those negotiations not resulting in an agreement, 22 percent were accompanied by strikes. The same empirical problem exists with evaluating the impact of mediation upon negotiation outcomes. We simply cannot tell whether the incidence of mediation is effective in bringing the parties to agreement (at least not in the present limited analysis). Mediators, for example, are less likely to be called in when both parties negotiate in good faith or when (in the present context) employers hope not to come to an agreement or unions don't want compromise. In any case, it is found that in 28 percent of the negotiations in the Indiana sample and in 33 percent in the nationwide sample, mediators were used. Of negotiations not resulting in agreement, mediators were used in 43 percent of negotiations, and where agreement was reached, mediators were present 29 percent of the time.

The major public policy questions of first-contract negotiations stem from employer violations of the NLRA and NLRB procedural delays. In approximately 19 percent of the Indiana sample, objections and/or challenges were filed by employers. The median days of delay associated with the NLRB resolution of these objections and challenges was 209 days. Applying the estimated coefficient of OBJDELAY to the 209 day median indicates the probability of successfully negotiating first contracts was reduced on average about 27 percentage points.

ULP complaints of refusal-to-bargain (deemed as meritorious by Region 25 of the NLRB) were filed by unions in 13 percent of the cases in the Indiana sample. (Nearly half of these complaints were accompanied by meritorious ULP charges of discrimination.) The median delay in resolving these charges was over 350 days. As discussed above, the probability of unions obtaining contracts was reduced by as much as 25 percentage points in these cases, everything else the same.

Employers hoping to chill the demand by workers for a union contract by discriminating against union activists are overwhelmingly successful. The estimates presented in table 3-3 indicate that the incidence of one or more 8(a)(3) violations reduces the probability of agreement by some 44 percentage points. Moreover, the incidence of such activity is not limited to a mere handful of employers—given that in 17 percent of the Indiana sample, meritorious 8(a)(3) charges were filed against employers.

The evidence clearly indicates that the rights of many workers to bargain collectively with employers are denied. Ironically, the very agency responsible for the protection of these rights (the NLRB) appears to be the unwitting accomplice to employers wanting to deny these rights to workers. In order to insure workers their rights to bargain collectively, two important changes must occur: NLRB procedures must be greatly expedited and discriminatory discharges must be blocked.

Chapter 4 will discuss in detail a number of proposals made by labor law reform advocates to accomplish both of these ends. We can now turn to a discussion and evaluation of these proposals as they apply to first-contract negotiations.

## NOTES

1. The drop in membership is smaller when one does not restrict the population to nonagricultural workers: from just over 25 percent in 1954 to 21 percent in 1980. Figures for 1954 are taken from *Handbook of Labor Statistics,* 1980, U.S. Bureau of Labor Statistics, Bulletin No. 2070, Table 165, p. 412; figures for 1980 are taken from *Daily Labor Report,* No. 181, September 18, 1981 (Bureau of National Affairs Inc.: Washington, DC) p. B-8.

2. See for example Fiorito and Greer (1982).

3. See the 1950 and 1981 *Annual Report of the National Labor Relations Board,* Table 13 (Washington, DC: Government Printing Office).

4. See for instance Dickens (1983), Freeman (1983), and Seeber and Cooke (1983).

5. Prosten also reports that 13 percent of his sample obtained contracts after winning elections in 1970, but that by 1975 they were no longer under contracts.

6. For discussion and debate over the basic sections of the bill (H.R. 8410) in the U.S. House of Representatives, see *United States of America Congressional Record, Proceedings and Debates of the 95th Congress, First Session,* Vol. 123, Part 25 (Washington, DC: Government Printing Office, 1977) pp. 32118-32132.

For a brief chronology of events ending in defeat of the reform bill, see *Congress and Nation,* Volume V, 1977-1980, Vol. 5 (Washington, DC: Congressional Quarterly Inc.), pp. 417-419.

7. For a separate report utilizing only the Indiana data see *Industrial and Labor Relations Review,* Vol. 38, No. 2, January 1985.

8. Resistance may be offset to some degree if by increasing the wage, higher quality workers are attracted over the long-run, which offsets added labor costs by direct increases in labor productivity and indirect capital substitution effects. For a recent analysis along these lines, see Clark, 1980.

9. The NLRB distinguishes between unfair labor practice strikes and so-called "economic" strikes. The rights to post-strike reinstatement following strikes is dependent upon this distinction. An unfair labor practice strike is one in protest of an employer's misbehavior; for example, a strike over an employers's refusal to bargain in good faith. In these

instances, striking workers are entitled to reinstatement at the end of the strike. Strike breakers only have temporary rights to employment. An economic strike is one in which the union attempts to improve wages or other terms and conditions of employment. In these instances, employers (at their discretion) may permanently replace strikers with nonunion strike breakers. Employers are required by law only to place strikers on preferential hiring lists. Unless the union strikes primarily over an employer unfair labor practice during first-contract negotiations (e.g., over illegal discharges or refusal to bargain), strikers face the potential of losing their jobs permanently. The propensity to strike over economic and other bargaining issues, one could surmise, is less during first-contract negotiations than during negotiations over contract renewals. Work units involved in first-contract negotiations are typically less cohesive, and strikes, therefore, are more easily broken. Consequently, the threat of permanent displacement weighs heavier (everything else the same) on work units involved in first-contract negotiations, effectively reducing the propensity to strike. See Feldacker, 1984, pp. 221-223.

10. In the Indiana sample, nonaffiliates reported losing 29 percent of their bids for first agreements.

11. In two cases, delay was extreme; 666 days and 857 days. OBJDELAY was set at 365 for these two extreme cases.

12. In seven observations, quarterly data on wages and/or monthly data on employment were not available for the full year. In these cases, the available data were used to approximate annual average wages.

13. See Cooke (1983), p. 410, for example. He finds a strong negative hyperbolic relationship.

14. Of the 20 states having right-to-work laws, 11 are in the 16 southern states. See source in table 3-2.

15. Data about organizational features were provided to me by representatives of the national unions (typically the research directors).

16. Concerned that collinearity between FIRM$/LOCAL$ and FIRM$/IND$ (simple correlation = .47) or between HIND$ and HILOCAL$ (simple correlation = .38) might have yielded inefficient estimates, we estimate the models dropping each variable alternately. In no case did the results change perceptibly.

17. A variable depicting the use of consultants was not utilized in the empirical model for several reasons. First, only 78 useable responses were collected. Second, employers who had sufficient negotiation expertise and inside consultation to avoid agreements would not incur the expense of

hiring outside consultants. Moreover, some firms may hire outside expertise without intention of not bargaining in good faith. Third, by relying solely on responses from union representatives, critics of the present findings could reasonably argue that some union representatives were looking for scapegoats for their own internal union weaknesses. Finally, and most importantly, it is not the use of consultants per se but rather any unlawful, unethical, or deceptive practices consultants sell to employers to undercut union bids for contracts that is of primary interest to our analysis. Procedural delay, discrimination, and refusal-to-bargain are such practices and these variables are already accounted for.

# Chapter 4

# Policy Implications and Recommendations

In light of the results of the research, what does one make of all this? What should be the appropriate response of Congress and the NLRB? Although there has been a long history of debate over a wide range of union organizing-related issues, the present study focuses only on several of these issues, albeit ones of much importance. The basic questions to be raised are fairly obvious; the answers and appropriate policies, however, are not. In the following discussion, we will examine (1) the issue of delay and how administratively it can be reduced as it pertains to objections and challenges to elections and to the refusal-to-bargain over first contracts; (2) the enforceability of the duty to bargain in good faith once the union has been certified as the exclusive bargaining representative, and (3) ways to halt heavy handed employers from discriminatorily discharging union activists.

Toward evaluating and recommending policy alternatives, we can begin by examining specific proposals embodied in the Labor Reform Bill of 1977 (for which there was considerable heated debate between its advocates and opponents).[1] We first describe these proposals and the arguments for and against each as presented by the proponents and opponents of the Labor Reform Bill. The pro-

posals are then evaluated and policy recommendations developed.

## Proposals for Labor Law Change

### *Expediting the NLRB Process*

There were four general proposals in the 1977 Labor Reform Bill designed to speed up NLRB case processing. Three of those proposals have direct implications for our analysis of first-contract negotiations. The fourth proposal, speeding up the election process, might well have an indirect effect in that the sooner the election campaign period between petition and election date comes to an end, the sooner victorious unions can begin negotiations over first contracts. This could be advantageous to unions simply because there would be less time for worker enthusiasm and cohesiveness to erode. Our focus here, however, has been on the role of NLRB procedures after elections have been won; hence, we will forego discussion of the election-timing provision of the Labor Reform Bill and limit our discussion to the three provisions that appear to have more direct implications.

#### *Summary Affirmation of ALJ Decisions*

Section 2(b) of the Reform Bill would have required the Board "to establish a summary procedure whereby a Board panel would, upon request, have the option of affirming an Administrative Law Judge's (ALJ) decision without a full hearing." Basically, this proposal was a move to reduce the time lapse between ALJ decisions and the Board's affirmance, modification, or rejection of ALJ decisions appealed to the Board. Although the Board would have been compelled to design its own summary affirmance procedure, it was expected that such decisions would follow the traditional standard in which at least 2 members of three-member panels would rule. (As described in chapter 2, all three members of a panel review a given case, with a quorum of at least two

members agreeing.) Nonparticipating Board members—normally their staffs—also review the proposed decision and can require a five-member panel decision if desired. Furthermore, any motion by the prevailing party and response by the losing party of ALJ decisions would be made within 30 days of the ALJ decision.

Past Secretary of Labor Ray Marshall stated in the introduction of the Reform Bill hearings:

> This would greatly reduce the extended time it now takes the Board to review even extremely simple cases. It would allow the Board to give more attention to the faster and more carefully considered resolution of the more difficult cases.[3]

Douglas Fraser (past president of the United Auto Workers) testified in favor of the summary affirmance proposal. He noted that (1) approximately 70 percent of ALJ decisions are *largely* adopted by the Board; (2) comparable affirmance rates in the other agencies average about 63 percent; and (3) the courts of appeal affirmance rate of NLRB orders averages roughly 71 percent. He interpreted these figures to "repute any claim that the Administrative Law Judge is fundamentally unreliable and that injustice will be done by rapid enforcement of the first NLRB decision."[3] Fraser goes on to argue that expedited review and affirmance in simple cases will deter meritless litigation as well as speed up the process.

> As the matter now stands, a deliberate violator of the labor law receives two full appeals *as of right,* in contrast to the one appeal *as of right* granted in the normal civil litigant in federal court.[4]

Although accepting the general proposition of summary affirmance of ALJ decisions, Theodore St. Antoine (then Dean of the University of Michigan Law School) was not optimistic that much time would be saved.

> I do have some reservations as to whether this is going to really make as much difference as it sounds on the surface that it is going to make, but at least as a matter of principle, the motion we should begin increasingly to rely upon a presumed finality of administrative law judge decisions is a proposition that I would accept.[9]

Speaking against the proposed bill in behalf of the Small Business Legislative Council, Peter Nash first argued that the 30 day requirement for motion and response does very little to speed up the process since current Board regulations provide, in essence, that exceptions be filed within 20 days and response from the other party within the subsequent 10 day period. Nash's conclusions is that if there is nothing or very little to be gained from the 30 day rule, why have it? He further contended that as a practical matter the Board and its staff currently distinguish simple, straightforward cases from complex ones, and usually dispose of the simpler cases more quickly than normal. Again Nash asks, why formalize the procedure if nothing significant is gained?

Indeed, Nash surmised that, if anything, the new 30 day rule might aggravate delay. In developing this line of argument, he first cites figures (in sharp contract with Fraser's above) that during fiscal year 1975 the Board affirmed without modification only 21.6 percent of ALJ decisions. He then argues that

> . . . if summary affirmance is sought, briefs and arguments on the complexity of the decision and the wisdom or lack of wisdom in granting summary affirmance would presumably be made by the parties. If summary affirmance was denied (as apparently would be the case in about 80 percent of all cases) then panel and possible full Board review would be required. . . . In addition, it is not unreasonable to assume that parties who have been subject to summary affirmance of an ALJ's deci-

> sion may move the Board for recommendation *en banc*. Whether or not such reconsideration is granted, this process will take additional time.[4]

Nash also adds that parties who fail to get full consideration of their cases by the Board would, in turn, be much more likely to contest a summary affirmance in the appellate courts. Hence, even further delay would be incurred.

*Expansion of the Board and Seven-Year Appointments*

Section 2(a) of the original House Labor Reform Bill would have expanded the Board from five to seven members and appointments would have been lengthened from five to seven year terms. The expressed purpose of these provisions was to increase the case handling capabilities of the Board. As was reported in the proposed bill, in 1975 the median delay at the Board in resolving ULP complaints was 315 days, was 358 days in 1976, and was 374 days by the third quarter of 1977. The cause of such delays was attributed to the enormous increase in the case load of the NLRB—from roughly 20,000 per year in 1960 to 49,000 in 1976. By expanding the Board to seven members but continuing to rely heavily on three-member panel decisions, cases could be resolved more quickly because more panels would be deciding cases at any point in time. (This presumes that the two new members would be given their own legal staffs and administrative support.) Addressing the potential cumbersomeness of a larger Board because nonparticipating members would continue to review tentative decisions to ensure conformity with majority Board policy, John Fanning (then chairman of the Board) testified that such a process "might become cumbersome if clearance were required of four nonparticipating members, but I think we can control that situation."[5]

Fanning also testified that by lengthening appointments to seven year terms, the Board would function better during those periods when the Board is short of members because a President fails to quickly fill expired appointments. He

noted that the Board has operated short-handed during 11 different periods over its 42-year history. Being short one member too often leads to so-called "iced" cases whereby the Board splits 2-2 on controversial or important decisions. Fanning cited, for example, that when member Walther had recently been appointed he had to cast the deciding vote in 75 such "iced" cases awaiting his appointment. Fanning and others conjectured that with a larger Board there should be fewer 3-3 votes than 2-2 votes during those appointment periods where the Board would be short one member. Hence, it was argued, the resolution of cases would be made more quickly.

Opponents to this provision failed to see how expansion of the Board to seven members would expedite case handling since every Board member eventually reviews every case. In fact, the Chamber of Commerce contended that we could expect increased litigation, which of course would add to, not reduce, delay.

> Consensus may be harder to achieve, especially in complex cases. The resulting increase in dissenting opinions could lead to reduced acceptance by the parties involved, and, therefore, increased litigation.[8]

Peter Nash took the above argument further.

> Moreover, not only will obtaining review and clearances from four nonparticipating members clearly be more difficult and time-consuming, but also there is a greater likelihood that full Board consideration will be requested when there are four nonparticipating members than when there are only two. Additionally, a decision by a unanimous panel of three Board members constitutes a majority of the full five-member Board; hence, a losing party has nothing to gain by requesting reconsideration by the full Board.[9]

Given the highly political nature of the NLRB appointment history and resultant bias of Board member voting (see

chapter 2), opponents of this provision argued that expansion of the Board and increased tenure for its members were designed to pack the Board with pro-labor members. In the end, the bill passed by the House restricted membership to no more than four appointees from either political party—evidence that politics and the NLRB seem inseparable.

*Expedited Enforcement of Board Orders*

Once the Board has made a decision and order against a party, the party may appeal the decision to a circuit court of appeals or the Board may seek enforcement of its decision and order through any circuit court of appeals if the defendant refuses to comply. As highlighted by the proponents of the Labor Reform Bill, many months and often years elapse between Board orders and resolution of cases that find themselves in the courts. It was reported by the Committee on Education and Labor, who introduced the bill, that in 1976 it took an average of 365 days for the courts to enforce Board orders.

The proposed mechanism for reducing this delay was to make Board orders "self-enforcing." That is, the courts (without examining Board orders) would simply enforce all decisions for which no appeal was filed within 30 days of Board orders. Parties who then fail to comply automatically find themselves in contempt of court.

Douglas Fraser provided perhaps the most thorough statement (before the House) supporting this amendment. His central argument was that the 30-day appeal requirement should substantially curtail frivolous litigation that is undertaken for the sake of delaying compliance. To support this contention, Fraser reported that the rate of appeals of Board orders has been rising. For example, only 46 percent of Board decisions were appealed to the courts in 1963, while 66 percent of Board orders were appealed by 1970. Yet this rise, according to Fraser, is not consistent with the quality of Board decisions since the courts' affirmance rate of Board decisions has also risen—from 76 percent during the 1956-1965 period to 82 percent during the 1967-1970 period. Fraser concluded from these figures and other circumstantial

evidence that much of the increased litigation is attributable to frivolous appeals made only for the sake of forestalling compliance with Board orders. He also contended that the general burden of the NLRB case load going to the courts (which accounts for nearly the same case load as all other federal agencies combined) would be reduced by the 30-day requirement.[10]

In testimony by the Chamber of Commerce, it was argued that the proposed amendment compelling aggrieved parties to appeal Board orders within 30 days would increase the overall number of appeals. The conclusion was based on the premise that only if employers raised objections to Board orders in employer-initiated appeals would employers be able to raise objections in an enforcement proceeding brought by the Board after 30 days. It was argued, therefore, that many employers would file appeals automatically in order to have sufficient time to later object to the Board rulings. The Chamber of Commerce went on to argue that once "having filed an appeal, an employer will be less likely to agree to voluntary compliance."[11] In summary, the opponents to the bill held that the 30-day appeal requirement would prove to be "self-defeating" instead of "self-enforcing."

In response to this argument, John Fanning has stated:

> It should also be kept in mind that a respondent in such a situation has been "faced with" the case for almost a year. What its standard is for compliance versus pursuing the case through further review can fairly be considered a matter already considered, if not precisely determined.[12]

Fraser also noted that most voluntary compliances are completed before the 30-day Board limit which now exists and where compliance is reached after 30 days, an appeal petition can be withdrawn.

Peter Nash, again speaking for the Small Business Legislative Council, argued before a U.S. Senate subcommittee on labor that all the fuss about delay is much ado about nothing.

> . . . on the issue of recalcitrant employer law violators, of the over 20,000 unfair labor practice cases filed against employers annually, less than 200 proceedings require ultimate court review . . . these figures hardly establish the kind of rampant employer lawlessness pictured by the proponents of labor law reform.[13]

The basic retort to this argument was to turn the argument upside down. If there are so few recalcitrant law violators then why does business object to such a provisional change in the NLRB? Moreover, it was typically argued that reducing delays was not a one-sided improvement; long delays can frustrate objectives of employers just as much as objectives of unions and workers. Only when it comes to the resolution of ULPs associated with union organizing does the evidence clearly indicate that reduction in delay will be disadvantageous to employers wanting to keep unions out of the workplace.

### *Remedies for Refusal to Bargain and Discriminatory Discharges*

Besides expediting NLRB procedures, proponents of labor law reform have also made several recommendations to deter employers from refusing to bargain and discriminatorily discharging union activists subsequent to union election victories. Next, we discuss provisions of the 1977 Labor Reform Bill pertinent to first-contract negotiations.

#### *The Make-Whole Provision*

One hotly debated provision of the Labor Reform Bill was the provision authorizing the Board to compensate the bargaining unit for the period in which the employer unlawfully refused to bargain. The basic purpose of this make-whole provision was to make it more costly for employers to intentionally prolong their duty to bargain in good faith. As it stands, besides denying workers tangible economic gains and the benefits of day-to-day representation

during the lengthy resolution period, time erodes the strength of unions to successfully negotiate contracts (resulting often in no contract at all or less attractive contracts). The current price to the recalcitrant employer is nearly zero, since, as it now stands, he is merely ordered to bargain.

In Fraser's remarks in support of a provision to compensate employees, he explained why the Board does not presently make workers whole during the refusal-to-bargain period. First, the U.S. Supreme Court (in H.K. Porter) has held that the NLRB cannot compel either party to grant any concession (see chapter 2); the Board can only compel the parties to negotiate. Second, Board remedies cannot be punitive, only remedial in nature. Hence, although the Board has on occasion noted its dismay in not ordering employers to compensate workers, it has felt it cannot. For instance, consider the Ex-Cello-O Corporation case, where the Board concluded:

> We . . . are in complete agreement . . . that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of two or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative.[14]

In order to allow the Board the option of making workers whole if it so desired, it was proposed that the given work unit receive compensatory damages equal to the difference between existing employee average wages and an estimated average wage increase employees would have likely obtained

had the employer actually bargained in good faith. Compensation could be awarded for some period between the date of certification by the NLRB and the date a first agreement would be signed. It was recommended that estimated average wages be computed against an index compiled by the Bureau of Labor Statistics (BLS). Initially it was proposed that the benchmark for probable wage increases would be the quarterly Report of Major Collective Bargaining Settlements compiled by the BLS (unless the Secretary of Labor preferred the use of an alternative index). For example, if it was found that (based on the BLS index) wages and benefits had increased 5 percent during the interim period of an employer's refusal-to-bargain then the affected work unit could be made whole by compensating workers an amount equal to 5 percent of their wages and benefits.

Representatives of the Chamber of Commerce (and other opponents of the bill) raised several objections to the proposed amendment. First, it was argued that it was the intention of the Supreme Court in H.K. Porter[15] to maintain a long established principle of "free" collective bargaining. The make-whole provision would in effect allow the NLRB to dictate the terms and conditions of employment, something the Court has refused to allow the NLRB to do. Moreover, the fine line between legitimate "hard bargaining" and refusal-to-bargain would be blurred, effectively denying employers the right to hard bargaining.

Second, it was argued that the Board and courts have long rejected the make-whole remedy because it is so speculative in nature.

> [F]aced with the potential damages under this proposal if the challenge is not upheld, an employer would be much less likely to challenge a union's representation status by engaging in technical refusal to bargain. This provision thus operates as a denial of due process by economic coercion.[16]

In retort to the first objection that the make-whole remedy will improve contract terms, Fraser responded this way.

> . . . the error lies in failing to distinquish between imposing a contract term, and using a reasonable expectancy of what the employees would have received but for the employer's violation of the statute as a measurement of the amount of compensatory award.[17]

In response to the view that the proposed make-whole remedy is too speculative and, therefore, unfair, Fraser (like others) argued:

> Opponents also argue that there is no evidence that any increase would have been agreed upon. The fault of this argument is that it assumes the necessity of proving that a contract would, in fact, have resulted. . . . Moreover, it must be said that there is likewise no evidence that a higher than average settlement would not have been reached. As a simple matter of fair play it seems desirable to share the risk of loss between both employer and employees rather than to have it fall totally and inevitably on the head of the innocent and financially-weaker employee.[18]

*Increased Back Pay*

Under current practice, an individual who is illegally discharged has a right to be reinstated and to receive back pay equivalent to the amount of lost earnings (with interest) between the date of discharge and the date of reinstatement, although any interim earnings would be deducted. The Board is also authorized to deduct from the back pay any amount it determines might have been earned if the individual would have been more earnest in his or her search for alternative employment.

The proponents of the bill sought to charge employers double back pay without mitigation—i.e., without subtract-

ing interim earnings or probable earnings. They argued for such a provision on the following grounds. First, it often takes years before illegal discharge cases are resolved. During the interim, considerable anguish and deprivation may have been experienced by the discharged employee and family members. Back pay with mitigation is insufficient compensation. Second, the back pay with mitigation award simply costs violators too little to act as a deterrent since avoiding union representation altogether is generally the intended purpose of illegal discharges.

Fraser points out that even when employers are finally compelled to make back payments, discharged employees generally wave reinstatement or do not remain employed very long on the job once reinstated. Fraser cites Stephens and Chaney (1974) to support this holding. In their study of 217 illegal discharges in NLRB Region 16 (Texas), it was found that only 70 individuals were actually reinstated and only 20 of those individuals remained in those jobs six months.

Fraser goes on to argue that in many cases there are 1-2 year delays in fixing the amount of awards subsequent to decisions and orders to reinstate. The proposed bill would effectively eliminate these lengthy hearings since employees would be awarded double back pay without mitigation for actual and/or probable earnings during the interim period. Therefore, many discharged employees would be reinstated more quickly and the time and expense of additional hearings would be saved.

Nash testified against the double back pay provision.

> Clearly, nothing aids a union more than the claim that it caused an employer to rehire a discharged employee. Thus, by imposing the threat of punitive damages upon an employer, . . . H.R. 810 imposes a threat sufficient to require many employers to rehire even lawfully discharged employees. . . .[19]

Representatives of the Chamber of Commerce claimed that the existing back pay with mitigation already amounts to a double monetary penalty to employers who illegally discharge union activists. This claim was based on the fact that besides back pay plus interest, employers incurred the expense of paying for a replacement and employment of legal counsel to defend the employer's action. "Would the imposition of double back pay add any more of a deterrent? We believe not."[20]

Chamber of Commerce spokesmen further argued that double back pay was designed to be punitive, not remedial. This punitive approach to resolving union-management relations, it was attested, would create an adversarial atmosphere both in the investigation and litigation stages of NLRB involvement. This would reduce the existing high settlement rate because it would be "counter-productive to the encouragement of cooperation which serves as an important step toward the achievement of peaceful labor relations in industry."

Former NLRB Chairman Edward Miller also testified against the double back pay provision. He argued that by increasing the ante to both parties, the incentive for both parties to litigate would likewise increase.

> If it's . . . an iffy situation, the employer is going to be willing to settle it, particularly if what the employee is really looking for is a cash settlement in any event. Many of them are. . . . A realistic union is also going to advice the employee that litigation is always uncertain and that a reasonable settlement offer is worth considering. The result is that many, many of these cases are settled every year.[21]

Finally, Nash argued (as others did) that double back pay has a moral hazard incentive.

> [T]he prospect of double back pay . . . will undoubtedly increase the number of nonmeritorious charges filed with the Board, all of which require some degree of investigation. Moreover, the double

> back pay windfall provides an incentive for deliberately false claims. Indeed, it is not unheard of for unions to either place their agents in the employ of an employer they seek to organize or to take advantage of even legitimate employee discharges in an effort to further their organizing goals. . . . If a union can obtain reinstatement of a discharged employee—particularly if the employee was lawfully discharged—its campaign is remarkably enhanced.[22]

*Injunctive Relief*

In order to undermine the deleterious effect of illegal discriminatory discharges during organizing and prior to the signing of a first contract upon the likelihood that workers will freely exercise their right to seek union representation, it was proposed that the NLRB be required to seek temporary federal court injunctions against unlawful discharges. As proposed, the issuance of a ULP complaint that a worker has been illegally fired (during an organizing campaign or after certification but prior to reaching a first contract agreement), the NLRB would be compelled to seek an injunction. If a U.S. district court saw fit to issue an injunction, then the worker(s) would be reinstated until litigation of the charge was completed.

Although the NLRB has the right to seek injunctions for discriminatory discharges and related illegal campaign activity under section 10(j), it has rarely exercised that right. The proposed amendment to the NLRA would have utilized section 10 (l) of the NLRA which presently requires the NLRB to seek temporary injunctive relief to preserve the status quo when a union engages in certain ULPs (secondary boycott activity and recognitional picketing).

Nash testified that although he saw the provision as designed to assist unions in their organizing campaigns, the use of mandatory temporary injunctions would not be im-

proper if ordered reinstatements were actually based upon findings that employees were illegally discharged.

> But 10(l) does not require any such findings. . . . The policy of the Board is that in cases of doubtful credibility—that is, where the Region is unable to resolve credibility on the basis of documentary or other objective evidence . . . a complaint should issue. . . . Cases involving allegations of discriminatory discharge are particularly prone to turn on credibility, inasmuch as the main issue is whether the motivating factor for the discharge was anti-union animus on the part of the employer. . . . Significantly, however, the standard to be applied by the district judge in determining whether to grant injunctive relief is even more lenient than that applied by the Board in determining to issue a complaint in the first place.[33]

Representatives of the National Association of Manufacturers (NAM) basically argued that the Board has sufficient existing means to remedy unlawful discharges. Besides reinstatement with back pay plus interest as a deterrent, the Board can set aside elections and order rerun elections, it can issue bargaining orders, and it can temporarily enjoin employers from unlawfully discharging employees empowered under 10(j) of the NLRA.

NAM representatives contend that wider and more expedient use of existing 10(j) injunctive relief would satisfy the underlying objectives of the proponents for mandatory 10(l) injunctions. The first problem with 10(j) is it is cumbersome to implement. First, a ULP charge must be investigated by a Regional Director. If he finds reasonable cause to believe a violation has been committed and the charging party requests 10(j) relief, a report of the case is sent to the General Counsel's office in Washington, DC. The General Counsel's staff then prepares a recommendation to the Board. If the

Board agrees that injunctive relief under 10(j) is appropriate, the case is then returned to the initiating Regional Director. The Regional Director then prepares the necessary papers for requesting an injunction. Although NAM did not suggest ways to expedite this time consuming process, they implied that efforts should focus on doing such. Besides the awkwardness of the 10(j) procedure, it was further argued that the courts would need to be more consistent in their use of criteria for injunctive relief.

> It is very probable that the discretion of the NLRB in 10(j) action has not been exercised more broadly because of the lack of clear-cut District Court decisions on when 10(j) relief should be granted. This is further clouded by splits by the courts of appeal on what must be just and proper. Some circuits have said if the injunction is necessary to prevent the purposes of the Act from being frustrated that is sufficient. Other circuits say that the relief must be necessary to preserve the status quo or for the prevention of irreparable harm. Still other courts have held that for the relief to be just and proper it must be in the public interest rather than for strictly private rights.[24]

In addition, the NAM representatives thought that although there have been very few 10(j) cases decided in the courts, it may be that cases are being effectively resolved between the time when requests from Regional Directors to the General Counsel are initiated and the time just short of a decision from district court judges. Unfortunately, these figures are not readily available.

> An examination of such statistics may well reveal that 10(j) is playing an important part in the effectuation of the policies of the Act. This coupled with a change in NLRB attitude toward seeking 10(j) relief as the Act says it should as well as speeding

> up its processes in the handling of 10(j) requests may be the answer to those who clamor for expeditious action under the act.[25]

In a later analysis of the 10(l) provision, former NLRB chairman Miller argues that such a provision would have clogged the Board machinery. He contends that the regional offices simply are not equipped to handle a major increase in court actions mandated by the 10(l) provision.

> . . . [R]egional offices would not only have to prepare the case for presentation before an administrative law judge, but would also have to prepare it for presentation in court and would have to deal with the problems of court deadlines, hearing schedules, court calls, and discovery procedures as well. The result would be a substantially larger administrative case load.[26]

Miller adds, however, that with a sufficiently increased budget, the basic problem could be licked in the long run. In the short run, on the other hand, he believes we would encounter a sizable bottleneck.

Professor Paul Weiler of the Harvard Law School also attests that utilization of section 10(l) to block illegal discharges would be, in practice, unworkable. First, he cites NLRB estimates that of the approximately 17,000 complaints a year of section 8(a)(3) violations, some 3,500 would require petitions for injunctions—a tenfold increase in the NLRA caseload before the district courts. Besides the practical difficulties of handling the flood of 10(l) petitions into the district courts, Weiler argues (1) that deciding upon the merits of discriminatory discharge complaints is far more complex than typically found in the present 10(l) decisions of whether recognitional picketing or secondary boycotts have taken place, and (2) employers would slow the 10(l) proceedings by litigating the complaint fully.[27]

Weiler (1983) also addressed the point made by proponents of the 10(l) injunction provision that the flow of cases to the NLRB and courts would eventually drop off because such injunctions would effectively deter employers from discharging employees for union organizing activity. That is, because an employer would have to reinstate rather quickly (presumably prior to the election or during the early stages of first-contract negotiations), the employer's illegal activity would fail to have the intended chilling effect. As noted above, given the capricious behavior of the employer, immediate reinstatement would likely enhance the union campaign because workers would see the need for union representation as all the more necessary. Weiler does not dismiss the plausibility of this counter argument. However, he argues that over the past fifty years nonunion employers have become strongly accustomed to violating section 8(a)(3). It would take, therefore, a long time before 10(l) injunctions would become effective deterrents.

Weiler (1983) then argues that we might, indeed, see an increase in complaints of discriminatory discharge.

> One of the effects of providing injunctive relief would be that the employee, knowing that he now has an effective right of reinstatement, would not be as likely to accept a settlement that left unremedied the impact of the employer's actions on the section 7 rights of his fellow employees. But if an employer were serious about resisting the union, it would probably not settle voluntarily for reinstatement before the election. As a result, the NLRB's settlement rate might drop in section 8(a)(3) cases, and the Board might then have to resort to seeking an injunction (pending the election) in even more cases than the projected 3500 annually.[11]

In his recent analysis of discriminatory discharges, Jeffery Smisek focuses upon the role of discriminatory discharges

(during certification election campaigns) in thwarting the rights of the group—not just the individual.

> The NLRA is designed to promote industrial peace through the encouragement of collective bargaining. By protecting concerted activities, that Act minimizes the disruption of commerce caused by industrial strife. . . . The rights protected by Section 7 are group rights. The NLRA gives no primary rights to employees as individuals, but instead gives primary rights only to groups.[19]

Although Smisek views the proposal to utilize 10(l) temporary injunctive relief to be consistent with the notion of protecting group rights, he regards amending 10(l) as an inadequate means for protecting group rights.

First, Smisek points out that even 10(l) injunction procedures take too much time—at least one month since regional offices must first conduct their investigations and attempt to informally settle the ULP complaint. Because this necessary delay allows employers to "time" their discriminatory discharges one month or so prior to the election, the targeted union activist(s) would be off the employer's premises and, hence, the employer's objective of intimidating other union supporters would likely be satisfied.

Second, Smisek agrees with others in that the widespread use of 10(l) injunctions against discriminatory discharges would necessarily flood the courts and require an enormous increase in NLRB staff to facilitate the processing of 10(l) injunctions. In addition, Smisek fears that once discharged employees were reinstated via injunctions, employers would have little incentive to litigate even where discharges may be meritorious.

> If a 10(l) proceeding (by reinstating the employee) causes the employer not to litigate further, then the entire elaborate mechanism of the NLRA for

deciding, with expertise, whether or not an unfair labor practice has been committed will be reduced to a hasty decision (of threat thereof) made by an overworked federal district judge with no expertise in NLRA administration.[30]

## Assessing the Proposals and Prescribing Policy Changes

Besides the proposals discussed above, other proposals have been made but ignored herein because they either did not bear directly upon first-contract negotiations, were very limited in their scope, or required rather radical departures from our 50 year tradition of regulating union organizing. For instance, speeding up the current representation election procedure will at best have an indirect and marginal impact upon successful first-contract negotiations. The 1977 Labor Reform Bill provision to debar "willful and repeated" violators from government contracts would likely be applied to no more than a handful of employers.

Smisek's proposal to temporarily suspend employer rights to discharge employees during election campaigns would be a radical departure from current labor relations law, especially if suspension of discharge rights were to be necessarily extended to cover first-contract negotiations. Likewise, Weiler's (1984) proposals to (1) require interest arbitration of first contracts in cases where employers do not bargain in good faith, (2) deny employers' rights to permanently discharge workers participating in strikes over first contracts, and (3) allow unions to conduct some secondary boycott activity, would all require major abandonment of the prevailing philosophy and *modus operandi* of government regulation of union organizing, changes that (as Weiler laments) are not likely to transpire in the foreseeable future. The policy prescriptions that follow are far more in tune with our traditional legal framework. And though some of the

prescriptions below will be costly initially or have short-run implementation difficulties, they hold sufficient promise of satisfactorily protecting the rights of work groups seeking union representation.

It is impossible to reasonably estimate the extent to which the provisions discussed above would reduce the amount of time it takes to process ULP complaints through the NLRB and court system. In large part, this difficulty is due to the fact that some parties have the primary objective of gaining delay, not due process. In his evaluation of the proposal for a summary judgement procedure permitting motions to the Board to affirm ALJ decisions, former NLRB chairman Edward Miller puts it this way:

> Such motions would have been routinely filed, routinely opposed, and very probably routinely denied, once defense attorneys learned what kinds of allegations proved successful. Perhaps this is too cynical a view, but judiciaries are understandably reluctant to ride roughshod over any defense which appears to have potential merit. And lawyers soon learn how to create sufficient appearances of merit to avoid hasty action by the decision makers. . . . The proposed procedure seemed all too likely simply to degenerate into a meaningless exercise in the appellate litany.[11]

The same kind of potentially crippling behavior would exist under the proposed amendment for so-called self-enforcing Board orders. Hence, those employers who seek to bust the union in first-contract negotiations via tactical delays will be prepared to thwart the best intentions of the labor law reformers. Stated somewhat differently, if the defendents to ULP complaints of refusal-to-bargain sought nothing more than due process, the proposals for self-enforcing orders and summary judgements of ALJ decisions would invariably speed up the process—at least modestly so.

Given an underlying motivation to increase delay, however, it is difficult to imagine that the above proposals would effectively reduce processing time.

With respect to the amendment for self-enforcing Board orders, it can be argued that one important reason for the relatively small proportion of cases that ultimately end up in court is that procedural delays incurred up and through Board decisions have been sufficient to break unions in first-contract negotiations. For instance, in the study of first-contract negotiations in Indiana, nearly all those unions that abandoned efforts to obtain a contract did so before their ULP complaints of refusal-to-bargain reached the appellate courts. Only two unions had not abandoned their efforts after nearly two years of effort. Given the evidence in chapter 3 that median delays in resolving objections and challenges was 209 days and in resolving refusal-to-bargain cases added another 350 days, it is readily understandable why very few unions have the wherewithal to withstand even greater delays associated with court processing. In summary, it is misleading to argue that no reform is needed here because the great majority of ULP complaints are *settled* prior to court appeal or enforcement. The facts on first-contract negotiations indicate that the disputes are *not settled*—they simply have become moot; the delay (even without court review) was sufficient to break union bids for first contracts.

Of the three proposals to reduce delay in processing ULP charges, the amendment to increase the size of the Board from five to seven members and extend Board appointments from five to seven years has the most to offer. Here, at least, the party seeking delay is not provided with an alternative means of circumventing the intended speeding up of the process. Instead, the Board's ability to expedite the processing of ULPs would be a function of the Board's ability to efficiently manage a larger Board membership and resultant staff. And although it is difficult to second guess how effi-

ciently managed a larger Board would be, we at least sidestep the problem of defendants thwarting the intended speed-up. According to an NLRB estimate in 1977, the costs associated with employing two additional Board members and their staff would be approximately $1.8 million annually.

One further proposal for reducing delay that was not proposed in the reform bill but does stem from the research presented in chapter 3 above is discussed next.

What strikes this author as the most time consuming and unnecessary step in NLRB procedures is the mechanism for resolution and enforcement of decisions regarding objections and challenges. The heart of the problem is that Regional Director and Board determinations of the legitimacy of objections and challenges are separate from the ULP complaint procedures. It appears that the Board established this policy in response to congressional intent underlying Section 9 of the NLRA (Recall from chapter 2 that Congress intentionally meant to insure that post-election objections would not be resolved in the courts in order to avoid unwanted litigation delays.) The crux here is that to get a court review or enforcement of decisions and orders about objections and challenges, the complaint can only be rerouted and reexamined via the ULP complaint procedure—but not until the initial decision has been rendered. Hence, employers can refuse to bargain as a means of obtaining a court review. Unions, on the other hand, have no effective means of generating a ULP complaint against themselves, if indeed they were to want a court review of their objections and challenges.

In addition, recall that the parties may select the stipulated version of consent elections, whereby objections and challenges can be appealed to the Board if losing parties are not satisfied with Regional Director decisions. Twenty years ago, nearly one-half of all certification elections were nonstipulated consent elections. Today, on the other hand, only 3-4 percent are nonstipulated consent elections. Given

that it takes considerably more time to get a Board decision than a Regional Director decision, the average delay to resolve objections and challenges has obviously increased substantially in the last twenty years.

In order to obviate this one-sided peculiar and lengthy appeal procedure, it is recommended that one of two policy changes be made. The first alternative would be to allow the losing party in Board decisions about objections and challenges to appeal directly to the circuit courts, and likewise allow the Board to directly seek court enforcement of its orders. A second alternative would be to make explicit in the NLRA that the Board has final and absolute authority regarding disputes over unit determination and campaign conduct. In other words, the circuit courts would not entertain any employer objections or challenges to representation elections. This latter alternative would simply plug the technical refusal-to-bargain loophole that Congress has allowed since 1947. With either recommendation, we could cut out months of unnecessary procedural delay.

### *Remedies and Deterrents*

#### *The Make-Whole Provision*

The make-whole proposal appears to have two objectives: (1) to compensate employees for what would have been obtained had the employer actually bargained in good faith; and (2) to deter employers from bargaining in bad faith from the start, since they would have to compensate employees anyhow for the period in which the employer refused to bargain in good faith. However, what was not presented in the hearings and testimony, yet seems central to the proposal, is whether or not the union ever prevails in securing a first contract—which is, of course, the central focus of this study. Are workers to be made whole only in those cases where unions eventually obtain contracts or also when contracts are never obtained? The language of the bill and pertinent testimony indicates that the provision would only have

applied to those cases where contracts were eventually obtained.

If we limit the make-whole provision to work units that ultimately secure an agreement, then instead of the BLS benchmark, an appropriate and more manageable solution would be to charge employers retroactively for an increase in compensation equivalent to that obtained in the contract itself. For example, if compensation was increased by 5 percent in the first year of the contract, the employer would be handed a bill for a 5 percent increase covering the period for which the Board found the employer in clear and flagrant violation of his duties to bargain in good faith. It should be emphasized that the Board would order such make-whole compenation only in those cases where it is reasonably evident that the employer was attempting to thwart his responsibilities to negotiate in good faith, not simply exercising his rights to "hard bargaining." This alternative proposal does not, however, avoid the difficulties of assessing what good faith bargaining really is or is not (see chapter 2) but it makes the practical matters of calculating fair and reasonable remedies much more efficient and specific to the employer. Furthermore, this alternative make-whole remedy would appear to obviate the H.K. Porter snag. That is, given the proposed make-whole remedy would follow the terms settled on voluntarily, employers, in effect, would not be compelled to grant concessions a la the H.K. Porter logic since they presumably would have to come to the given (or similar) agreement had they not failed to negotiate in good faith in the first place.

But what does one propose for cases in which no contract is gotten? This is where the problem arises no matter what make-whole scheme is used. The first difficulty is the most obvious: Over what time period are workers to be made whole? Would it be between the period that bad faith behavior begins and the date upon which the union abandons its efforts? If the union fails to gain a first contract and establish a long-term relationship, the make-whole remedy is

nothing more than a hollow victory for the union. More unfortunately, however, the make-whole provision may not act as a deterrent to recalcitrant employers but rather as an additional incentive to avoid the first contract altogether. That is, the make-whole provision, unless it can be applied in some way to those situations in which no contract is gotten, increases the costs of unionization to employers and hence would *a fortiori* induce employers to deny first contracts altogether.

In summary, it appears that the make-whole provision is not a very effective proposal by which workers' rights to union representation would be promoted. The practical administrative aspects are burdensome and the courts are likely to play havoc with make-whole remedies of this kind because of their necessarily speculative nature. More important, however, the make-whole provisions would be an incentive to many employers to avoid contracts altogether, if indeed, make-whole remedies applied only to employers who eventually agree to a contract.

*Back Pay and Reinstatement*

Reimbursing illegally discharged workers more than what is reparative of their income loss is anathema to the underlying philosophy of the NLRA. It is interesting to note that this philosophy prevailed in both the final House version of the labor reform bill and in the Senate's version. The final House bill sought double back pay but with mitigation of interim earnings and the Senate subsequently reduced back pay to one-and-one-half. As Weiler (1983) points out, the "assumption that NLRB remedies should be reparative rather than punitive was so pervasive that even the Labor Reform Act's supporters defended the measure as a means of compensating discharged workers for actual harms suffered over and above lost pay."[32]

Since our primary interest in this study is the impact of discriminatory discharges and other employer activities upon the group's behavior, we must assess whether larger back

pay awards would act as an effective deterrent to disciminatory discharges. Our assessment is that it would not—for the following reasons.

First, even double back pay awards (especially with mitigation) would prove to be very inexpensive when weighed against the likely increase in hourly wages once the work unit unionizes (actual labor cost increases are bound to be much higher on average). Assume the work unit is comprised of 100 employees and the average hourly wage is $8.00. Also assume that workers work 40 hours per week, 52 weeks per year. With a 10 percent increase, the total wage bill would rise from $1,664,000 in the first year alone to $1,830,400—a $166,400 increase. Say the employer discharges three active union adherents. If those three employees earned the average annual wage of $16,640 and a settlement was reached after one year, the total wage costs to the employer would come to $49,920. With mitigation for earnings received during the one year interim, the costs would be substantially lower. For instance, if the three discharged employees earned an average of $8,000 during the interim, the cost to the employer in back pay would come to only $24,920. If the initial reform bill provision for double back pay without mitigation had become law, and the cost to the employer for attorney fees and replacement costs (e.g., recruitment and training) were less than $66,000, the employer still gains financially by illegally discharging union activists. Given our earlier estimates of the impact of discriminatory discharges upon the likelihood that employers are able to avoid first contracts, the financial gamble is typically a very small one for the employer.

Furthermore, even using the above very conservative assumptions, in one year the employer recoups his "investment" in illegal discharges. Since the union wage differential would likely persist for many years (if not indefinitely), it is difficult to imagine how (under most circumstances) even double back pay without mitigation would serve as a signifi-

cant deterrent to illegal discharges, given that their purpose was to defeat the union.

Consider next the role of reinstatement along with back pay awards. Available evidence indicates that a large proportion of illegally discharged employees are never reinstated in their previous jobs. According to NLRB records, of the 26,631 employees receiving back pay from employers in 1981, only 6,463 were also offered reinstatement. Assuming that 90 percent of these workers were illegally discharged, only 27 percent were offered reinstatement. Approximately 22 percent of these turned down reinstatement offers. Another 14 percent of illegally discharged employees were placed on preferential hiring lists. According to a 1982 U.S. General Accounting Office report, only 39 percent of their sample of 151 illegally discharged workers (who were involved in union election campaigns) were offered reinstatement as part of their settlement. Only 69 percent of those offered reinstatement returned to their former employers. Stephens and Chaney (1974) found in their investigation of a sample of 217 discharged employees that only 41 percent of those offered reinstatement agreed to reinstatement. However, one-third of those agreeing to reinstatement were merely placed on preferential hiring lists; and 42 percent of these workers were never rehired. Overall, therefore, only 32 percent of workers offered reinstatement in the Stephens and Chaney sample eventually returned to work for their former employers. Furthermore, of those reinstated, approximately 68 percent had left their jobs within six months.

The evidence suggests that not only is discriminatory discharge activity financially inexpensive to the employer, in the great majority of cases it appears that discriminating employers are able to keep union supporters from returning to work. This has two long-run effects upon union organizing success. First, an employer demonstrates loudly and clearly to his workforce that he can effectively prevail over

the law when it comes to discriminatorily discharging union activists. The message is: "*If I don't want you around, you won't be around.* The law won't protect your rights to union activity or your job." The second effect is that union activists will not be back to help later in organizing the workers where the union lost the election or failed to get the first contract. Hence, neither the present practice nor the double back pay without mitigation proposal for remedying discriminatory discharges is likely to deter employers from engaging in violations of section 8(a)(3).

*Injunctions*

Of all the labor law reform provisions proposed, modified, and withdrawn during 1977 Labor Reform Bill hearings, requiring the NLRB to automatically process meritorious discriminatory discharge cases as 10(l) priority complaints is the only one suitably designed to effectively eliminate the incentive to employers to illegally discharge union activists. Temporary injunctions have promise of eliminating such illegal employer coercion because sufficiently quick reinstatements will cause such behavior to backfire. That is, employees will see vindictive employers for what they are but simultaneously not be intimidated since the law will be there to protect their rights. In turn, above-board campaigns and legitimate hard bargaining will prove to be the more successful routes for employers wanting to avoid union representation and to minimize the cost of first contracts.

It is important to note that opponents to bringing discriminatory discharges under the purview of 10(l) attacked the proposal on grounds that it would flood the NLRB and district courts. In addition, it was argued that 10(j) injunctions and other remedies were already available, which could be used more widely. No one seriously opposed the provision because it would undercut any traditional underlying philosophy of U.S. labor law, that discriminatory

discharges should not be enjoined, or that employers would be able to readily circumvent the application of injunctions. In fact, it is important to bear in mind that the Landrum-Griffin Act amended the NLRA, giving the handling of discriminatory discharges priority treatment right behind Section 10(l) cases. As Section 10(m) reads:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of Section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

Hence, it would appear that the stage is nicely set for bringing 8(a)(3) charges under the wing of 10(l) injunctions.

With respect to the availability of existing remedies (10(j) injunctions, reinstatement, back pay, and setting aside elections), none is sufficient to block discriminatory discharges. First, the evidence presented above makes it pretty clear that potential back pay and reinstatement awards are not deterrents to many employers. Second, setting aside elections due to egregious employer misconduct and consequently either rerunning the election or issuing a bargaining order are also obviously having little effect upon deterring employers from making unlawful discharges. Moreover, winning a rerun election or obtaining a Gissel-type bargaining order is of little value if the union cannot force the employer to negotiate in good faith over the first contract.

Seeking 10(j) injunctions to block discriminatory discharges has rarely been utilized by the NLRB. Recent reports by the General Counsel show that only a handful of 10(j) injunctions are requested in any given year.[11] The criteria used by district courts to decide on 10(j)s vary greatly. Furthermore, the 10(j) procedure does not provide priority treatment. According to the only data available, Helm

(1983) reports that it takes a median time of 113 days to get an issuance of a court order subsequent to the initial filing of a section 10(j) petition. If discharged employees cannot be reinstated quickly, i.e., sufficiently before an election is held if discharged during the election campaign period, and in the early months of first-contract negotiations if discharged subsequent to winning an election, then the debilitating impact of discriminatory discharge on the group rights is not obviated.

Finally, utilization of the 10(j) provision is strictly at the discretion of the NLRB. Given our discussion in chapter 2 of the NLRB's regularly changing political makeup and consequent prounion or promanagement leanings, it would be important to mandate that the Board proceed under specified criteria to petition the courts for section 10(l) relief. Consider, for instance, a recent statement made before a House subcommittee by Laurence Gold (Special Counsel to the AFL-CIO).

> A comparison of the Board's grants and denials of authorization in [10(j)] cases against unions and those against employers . . .reveals a striking difference. Since the present chairman took office, nearly one out of every two recommendations to seek 10(j) injunctions against an employer was rejected, whereas every injunction but one sought against unions was authorized. In comparison, the 'old' Board's treatment of unions and employers was roughly equal."[14]

The most compelling argument against 10(l) injunctive relief is the perceived administrative bottleneck to be incurred from handling a larger caseload. But as I will argue below, there is good reason to believe that the deterrent effect of prospective injunctions can reduce rapidly and permanently the growing number of illegal discharges and 8(a)(3) violation complaints before the Board.

According to estimates by the NLRB General Counsel's office, about 95 percent of 8(a)(3) violation complaints involve discharges and 90 percent of these are believed to be associated with union organizing—either during the election campaign or during first-contract negotiations. Also the Board estimates that 40 percent of all ULP charges are meritorious and that one can conservatively anticipate a 50 percent settlement rate prior to 10(l) trials. Using these NLRB estimates, Smisek (1983) estimates that there would have been approximately 2,800 section 10(l) trials in fiscal year 1979. In comparison to the 1979 total federal district court caseload of 11,764 cases, application of section 10(l) to discriminatory discharges associated with union organizing would have increased the district courts' caseload by 24 percent.

The projected increase in NLRB processing of discharge cases before the district courts would also place an added burden on the NLRB. The board has estimated that it would require 9.2 attorney days per 10(l) trial, which translates into 102 new attorneys to handle the case load projected by Smisek. Of course, there would be the added costs of increasing regional office investigative agents to handle the expedited nature of these cases. The Board has projected a 33 percent increase in the number of agents needed and an increase in clerical support by a ratio of one clerical worker per two new professionals. Obviously, a several million dollar increase in the NLRB budget would, therefore, be required.

As illustrated rather dramatically in table 2-4, there has been a steady and rapid increase in 8(a)(3) charges. Not only is the current level of discriminatory discharges unacceptably high, one can reasonably presume that the incidence will continue to climb (given the evidence that discriminatory discharges have a substantial impact upon keeping unions out of the workplace). The question here, of course, is whether or not we as a public feel compelled to pay the costs associated with utilizing 10(l) injunctions and whether or not

10(l) will eventually reduce discriminatory discharges (and concurrently reduce the financial burden).

The central issue to be evaluated, therefore, is whether or not the application of 10(l) injunctions to discriminatory discharges will indeed effectively diminish the practice of discriminatory discharge. There is good reason to believe that it can, albeit perhaps not in the very short run. First, it can be argued that quick reinstatement of discharged union activists would do more than simply neutralize the organizing and negotiation environments; it would given unions added advantage because workers would see the discriminatory behavior of the employer as vindictive and hostile toward union representation. Discriminatory discharges would play nicely into the hands of union organizers who would be able to demonstrate the "true colors" of the discriminating employer and simultaneously demonstrate that union representation can protect workers from employer coercion and threats to their jobs. The real threat of quick reinstatement with back pay, therefore, would stand as a significant, if not powerful, disincentive to employers to utilize discriminatory discharges as an inexpensive means of busting union organizing efforts. The employer would likely fare considerably better in keeping the union out by playing the game above-board rather than punching below the belt.

If utilization of 10(l) injunctions is to hold promise, reinstatement of illegally discharged union supporters would have to be fairly swift, especially during certification elections where the campaign period may only be one or two months in comparison to several months of negotiations over first contracts.

Unfortunately, there are no complete published data (and the NLRB tabulates no unpublished figures of their own) on the length of time involved in processing section 10(l) petitions. Some parts of the picture were reported in a special NLRB task force report in 1976, however. Based on a 1972 General Counsel memorandum, it was reported that it took

at the median approximately seven days from filing of a 10(l)-related ULP charge to obtain a regional determination and another five days to file 10(l) petitions.[35] In cases submitted to the Board for advice, it took another seven to eight days for submission of advice. It took a median of three days to petition the courts once the Board's advice was given. However, no statistics were made available in the memorandum with respect to how long it took for the Board to give its advice, nor how long it took the courts to decide to impose injunctive relief. Furthermore, no evidence was given as to the proportion of cases submitted to Washington for advice.

Assuming, however, that the Board takes a median of 10 days to give its advice, that another 10 days are needed for district courts to hold a trial and issue an injunction, and that all new cases involving discriminatory discharges will require submission to the Board for advice, it would take a median of 43 days from filing of the charge to issuance of a 10(l) injunction. As pointed out by the opponents of the 10(l) amendment, there is likely to be further delay in deciding upon the merits of discriminatory discharge complaints because they involve more complex circumstances than the legality of union picketing and boycotting and they involve determining employer motive. Assuming it takes another 10-12 days to resolve questions of merit, the projected median delay would be roughly 55 days.

With respect to discharges during first-contract negotiations, a median 55-day reinstatement period would very likely serve its purpose and hence have a substantial deterrent effect. In contrast, the 55-day median would be generally ineffective during short-lived election campaigns. An employer could easily time discharges so that the union supporters were out of the way until after the election. Given the blatant purpose underlying discriminatory discharges and the serious impact on the group of such discharges, it would be wholly consistent with present NLRB policy and practice to order rerun elections and issue bargaining orders. Before the rerun election, the illegally discharged employee(s) would be reinstated and the employer's ploy would very likely

backfire. It is recommended, therefore, that the Board recognize the seriousness of discriminatory discharges as they indisputably "interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the NLRA." Recognition of this by the Board should automatically (or nearly so) trigger rerun elections if not bargaining orders. Once it becomes evident to employers that even "timely" discharges in election campaigns will shortly thereafter frustrate their attempts to illegally undermine union organizing, the disincentive will prove sufficient to substantially reduce the occurrence of discriminatory discharges.

Let us now address more specifically several of the arguments against the use of Section 10(l) injunctions in discriminatory discharge cases. Weiler (1983) suggests that the rate of Section 8(a)(3) complaints and subsequent 10(l) proceedings might rise because neither party will be willing to "settle" voluntarily. On one hand, he argues that employees would have less incentive to settle for back pay without reinstatement if, indeed, injunctive relief were available. At first glance, one would have to agree. Given the evidence presented in the U.S. GAO (1982) and Stephens and Chaney (1974) studies, discharged union supporters have little reason to want to return to the employer—especially, one can imagine, where it is apparent the union has been busted in its effort to represent the work group. The kind of voluntary settlement Weiler alludes to, however, is really nothing more than a means of "buying off" discharged employees. However, because employers would no longer be able to cheaply buy off discharged employees, they would have less incentive to discharge employees in the first place, i.e., the deterrent effect becomes even greater.

With respect to the other side of the coin, Weiler argues that "if an employer were serious about resisting the union, he would not settle voluntarily for reinstatement before the election."[6] I think we have to agree, but, as proposed above, it is recommended that in those cases in which employers do not settle voluntarily before the election, the

Board would automatically order a rerun election based simply on any meritorious complaints of discriminatory discharge. Again, it seems likely that the employer has more to lose from the eventual rebuff to his behavior than he can expect to gain from discriminatory discharges.

Smisek's (1983) fear that employers who lawfully discharged workers during union organizing efforts but saw these employees reinstated via 10(l) injunctions would not eventually litigate cases through the NLRB and courts appears to be unfounded. Where employers strongly believe that their activity was not motivated by antiunion animus, they would still have good reason to litigate to protect their rights to lawfully discharge employees. Furthermore, one would have to doubt that the disincentive to litigate cases subsequent to temporary restraining orders would be much different than we would find presently for unions that have been enjoined under Section 10(l) for illegal concerted activity. We cannot expect to rectify all the weaknesses of the law governing union-management relations, but in all fairness we can insist that what is fed to the goose, be fed to the gander.

## Conclusion

In conclusion, our policy recommendations are designed to (1) halt discriminatory discharges preceding certification elections and during first-contract negotiations and (2) expedite NLRB case handling of objections and challenges and employer refusals to bargain. Short of legally forcing employers to sign first contracts, we see no way to legally compel employers to bargain in good faith. Instead, our recommendations are expected to substantially increase union bargaining power. Unions in turn will necessarily have to utilize this increased power to economically force recalcitrant employers to fulfill their duty to bargain. In short, our recommendations will better allow workers to remain cohesive during first-contract negotiations, increasing the potency of strike threats and concerted activity.

## NOTES

1. See hearings before the U.S. House of Representatives and U.S. Senate. *Labor Reform Bill of 1977,* parts 1 and 2, Hearings before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress (U.S. Government Printing Office, 1978); *Labor Reform Bill,* parts 1 and 2, Hearings before the Subcommittee on labor of the Committee on Human Resources, U.S. Senate, Ninety-Fifth Congress (U.S. Government Printing Office, 1978).

2. *Labor Reform Bill of 1977,* part 1, House of Representatives, p. 38.

3. Ibid., p. 277.

4. Ibid., p. 278.

5. *Labor Reform Bill of 1977,* part 2, House of Representatives, p. 360.

6. *Labor Reform Bill,* part 1, Senate, pp. 1038-1039.

7. *Labor Reform Bill of 1977,* part 1, House of Representatives, p. 391.

8. Ibid., part 2, p. 533.

9. *Labor Reform Bill,* part 1, Senate, pp. 1033-1034.

10. *Labor Reform Bill of 1977,* part 1, House of Representatives, pp. 279-281.

11. Ibid., part 2, p. 548.

12. Ibid., part 1, p. 426.

13. *Labor Reform Bill,* part 1, Senate, p. 1025.

14. *Labor Reform Bill of 1977,* part 1, House of Representatives, p. 288.

15. H.K. Porter Company v. NLRB, 397 U.S. 99 (1970).

16. *Labor Reform Bill,* part 2, House of Representatives, p. 547

17. Ibid., part 1, p. 291.

18. Ibid., p. 289.

19. Ibid., p. 514.

20. Ibid., p. 545.

21. Ibid., part 2, p. 753.

22. *Labor Reform Bill,* part 1, Senate, pp. 1069-1070.

23. Ibid., pp. 1071-1073.

24. Ibid., p. 698.

25. Ibid., p. 699.

26. Miller (1980), p. 125.

27. Weiler (1983), pp. 1802-1803.

28. Ibid., footnote no. 130, p. 1803.

29. Smisek (1983), p. 567.

30. Ibid., p. 567.

31. Miller (1980), p. 126.

32. Weiler (1983), p. 1791.

33. Of the total of 17,571 8(a)(3) ULP charges filed with the NLRB in fiscal year 1981, the general counsel interceded on behalf of workers under section 10(j) in only 42 of these charges.

34. Laurence Gold, *Daily Labor Report,* No. 56, March 22, 1984 (Bureau of National Affairs, Inc., Washington, DC), p. E-7.

35. *1976 Interim Report and Recommendations of the Chairman's Task Force on the NLRB,* reprinted in *Daily Labor Report,* special supplement, No. 216, November 8, 1976 (Bureau of National Affairs, Inc.: Washington, DC), p. 20.

36. Weiler (1983), footnote No. 130, p. 1803.

# Chapter 5

# Summary and Conclusions

The purpose of this study has been to investigate the factors that explain why 25-30 percent of the time unions fail to obtain contracts after winning the right to negotiate contracts in secret ballot representation elections. Several of these factors have major implications for public policy as they are tied to labor relations law and its application to union organizing. In order to fully understand the workings of the law and the implications of our findings upon appropriate public policy reform, we began with a historical overview of American labor law and a detailed examination of the policies, practices, and experience of the National Labor Relations Board (NLRB) which regulates labor-management relations and union organizing in the private sector. We then described our research design and findings of an investigation of the factors that impact upon the likelihood that unions obtain or fail to obtain first contracts. Finally, we drew upon our findings and knowledge of the law to prescribe changes in public policy to better effectuate the purposes of the National Labor Relations Act (NLRA). In this final chapter, we summarize the salient points of each chapter.

In chapter 1 we sketched out the history of labor law in the United States, beginning with the treatment of unions as criminal conspiracies in the early 1800s, then as monopolistic

entities in the early 1900s, subsequently as torchbearers for the working class from the mid-1930s to the mid-1940s, and finally as tightly regulated associations.

Prior to 1947, our labor relations legal environment swung slowly from one extreme in which the hands of unions were tied behind their backs to the other extreme where their hands were free. Since 1947, the legal system has attempted to restrain the hands of both unions and employers, seeking the peaceful resolution of disputes by balancing the power of both parties and restricting activities disruptive to commerce and, hence, the public. Based on the evidence presented in this report, the current application and inadequate enforcement of the law is allowing the pendulum to swing out of balance.

That the pendulum has swung out of balance has been the topic of considerable ongoing public debate. Indeed, during June 1984, several days of oversight hearings were conducted by the U.S. House of Representatives' Labor Subcommittee on Labor-Management Relations and the Government Operations Subcommittee on Manpower and Housing. Below is the opening statement of Chairman William Clay (Democrat from Missouri), Subcommittee on Labor-Management Relations.

> Today we begin three days of hearings to examine the question "has labor law failed?" It is my belief that labor-management relations is currently undergoing one of the most difficult periods since the original enactment of the Wagner Act nearly fifty years ago. . . . In the nineteen thirties, labor leadership was in the forefront of the struggle to enact the very same law many leaders now claim should be abolished. . . . These changed views and perceptions on the part of labor leaders and workers, regardless of their validity, have undermined the single most important underpinning of

the collective bargaining process, faith in the fairness of the system.[1]

Most of the testimony made before the two subcommittees focused upon union organizing protections and the shifting direction of the Reagan Board. The following statements are illustrative of the testimony.

> The NLRB was originally established to move labor management relations out of the 'law of the jungle.' The idealogues appointed by the Reagan Administration have accelerated a process that began years ago to gut the protections for workers contained in the labor laws of this country. As a result, labor-management relations is back in the jungle. . . .
>
> Forget the long procedure to get justice—a justice that would be overturned when it reached the Board anyway.
>
> Forget the false hopes we'd been giving workers that the NLRB would protect their rights.
>
> Now, we tell those workers who want to join our union—'if your employer fires you for union activity, we'll strike him.'
>
> 'We'll give him a taste of his own medicine.'
>
> In other words, because the UFCW cannot rely on the NLRB for justice, we'll get it ourselves.
>
> We'll get it in the streets if necessary.[2]
>
> William H. Wynn, President
> United Food and Commercial
> Workers International Union

> In answer to the question, 'Have the labor laws failed?' I would have to respond, emphatically, no. The changes in Board law which we have witnessed in recent months have restored needed balance and even-handedness to the law. These corrections are long overdue and are proof that the NLRA has not failed. Instead, they are proof that the labor laws

> are working. The viability of this self-correction process should be a source of enthusiasm for the Act, not dire and misleading claims that the Act has 'failed'. . . . If the labor laws break down sometime in the future, it will not be because of Board decisions. Rather, those who have embarked on a negative strategy which encourages disrespect for law, the Board and the Act, will have themselves to thank.[3]
>
> John S. Irving, former General Counsel of the NLRB, and Management Attorney, Kirkland and Ellis, Washington, DC

It is not our purpose to weigh the merits of the most recent Board decisions or to deduce any antiunion animus on the part of Reagan appointees. Clearly, however, current Board decisions are generally unfavorable to unions. Nor has it been our purpose to examine the NLRA and NLRB procedures and practices in their totality. Serious inequities in the law and in its application are likely to exist (and persist) for workers, unions, and employers. Instead, our purpose here has been to examine through empirical research (not intended to be prounion or promanagement in its design or through statistical inference) those factors that impact upon first-contract negotiation outcomes. The findings of this research must speak for themselves and the policy recommendations must be seen in light of the findings. Given the current debate over the broader question of "has labor law failed?" additional research examining other potential failures is clearly needed. Until that research is completed, however, prematurely abandoning our present labor law is likely to be exacerbating for all parties (including the public) and in the end be self-defeating for all.

In chapter 2 we described the structure, policies, procedures, and case flow of the NLRB. In its role as regulator of labor-management relations in the private sector, the NLRB wears two hats—one to conduct and regulate representation elections and to resolve disputes arising

therefrom and one to resolve unfair labor practice (ULP) disputes as defined by the NLRA. Of particular importance to the present inquiry, we reviewed the policies and practices of the NLRB regarding bargaining unit determination, appropriate campaign conduct, the resolution of objections and challenges to representation elections, bargaining orders, rerun elections, employer refusals to bargain, and employer discrimination against union activists.

By fiscal year 1981 (the latest figures available), the NLRB was inundated with over 43,000 ULP charges and took in another 12,500 representation cases. The 1981 ULP case load reflected a seven-and-one-half-fold increase since 1950. In 1981 objections were filed in more than 15 percent of elections lost by employers, up from 5.7 percent in 1965. The Board issued a total of 53 bargaining orders to employers committing egregious campaign conduct violations in 1979 (the latest figures available), which was only 40 percent of the total bargaining orders issued in 1965. The Board also ordered elections to be rerun in 147 cases in 1981 (of a total of 6,656 elections held), which reflected a modest drop from the 188 rerun elections in 1965. However, unions won only 30 percent of the rerun elections in 1981, whereas in 1965 they won about 44 percent. These figures can be compared to a union victory rate in all certification elections of 45 percent in 1981 and 65 percent in 1965.

There were nearly 10,000 charges against employers for refusal to bargain in good faith in 1981, a seven-and-one-half-fold increase since 1950. Of all the employer or union ULP charges brought before the NLRB, charges of employer discrimination against union activists top the list. In 1981, over 25,000 workers received back pay because of employer discrimination, more than 11 times the 1950 figure of 2,250.

Finally, it should be emphasized in our summary that there is considerable procedural delay associated with resolving ULP complaints. ULP charges are first brought before the various regional and subregional offices. Here the offices investigate ULP charges, dismissing charges or convincing complainants to withdraw charges approximately two-thirds

of the time. Another 15 percent of charges (deemed meritorious by the NLRB) are "settled" at this informal stage. In 1981, the median delay associated with all this informal activity was 44 days. The remaining charges become formal complaints and in 1981, 12 percent of the total caseload was settled after issuance of a formal complaint but prior to administrative law judge decisions. The median delay for this step was an additional 173 days. The remaining cases work their way through ALJ decisions (adding another 139 days at the median in 1981) and appeals to the five-member Board in Washington, DC (adding yet another 120 days at the median in 1981). Hence, for those cases needing resolution at the Board level (over 1,200 in 1981) a median delay of 490 days was incurred in 1981. Those Board decisions and orders appealed to the circuit courts of appeal or requiring circuit court enforcement generally take at least another year to process. In conclusion, the issue of delay is obviously important to the analysis of first-contract negotiations because unions cannot legally require employers to negotiate first contracts until all objections and challenges to elections are resolved. Because employers can take unfavorable Board rulings concerning objections and challenges to the appellate courts via technical refusals to bargain, procedural delay in resolving these disputes takes an inordinate amount of time.

In chapter 3 we estimated the impact of selected variables on the probability that unions obtain first contracts. Hypotheses were derived from a theory of relative bargaining power which holds that factors that increase a union's power vis-a-vis the employer's power, increase the likelihood that first contracts will be obtained. Variables reflecting labor costs, the economic environment, the sociopolitical environment (including legal factors), organizational characteristics, and relative negotiating skills were identified as salient determinants of first-contract negotiation outcomes. Empirical models employing these variables were then specified to test our hypotheses against two samples of data (collected and compiled from a variety of data sources, including surveys of union representatives).

It was found that 23 percent of our sample of unions from Indiana and 28 percent nationwide failed to obtain first contracts. The statistically significant results of our tests can be summarized as follows.

- Unions negotiating with firms having relatively high wages vis-a-vis the firm's industry were more likely to obtain contracts.
- Unions negotiating contracts with firms in which separate bargaining units were already under contract with the union were more likely to obtain first contracts.
- In southern states with state right-to-work laws, unions were less likely to obtain contracts than in other states.
- Where the percent of workers voting for union representation was higher and the size of the work unit was larger, unions were more successful in obtaining agreements.
- In those negotiations in which national union representatives were involved in negotiations, unions were more successful in reaching agreements.
- Where the national union required national approval of local first-contract agreements, unions were less successful in obtaining agreements.
- The delay associated with NLRB resolution of employer objections and/or challenges to union election victories sharply reduced the chances of unions obtaining first contracts.
- Employer refusals to bargain substantially reduced the chances of unions obtaining first contracts.
- Discriminatory discharges and other forms of illegal discrimination against union activists have a dramatic negative impact on the likelihood that unions obtain contracts.

It is the latter three findings that demonstrate the need for labor law reform. In chapter 4 we tackled the evaluation of

various proposals for labor law reform. The three key areas of recommended changes stem from our need to expedite NLRB proceedings, to block discriminatory discharges of union activists, and to induce recalcitrant employers to negotiate in good faith.

Toward expediting NLRB case handling, several proposals in the Labor Reform Bill of 1977 were first evaluated. We dismissed the proposals that would (1) allow the Board to make summary judgements of uncontested ALJ recommendations and (2) make Board orders not appealed within 30 days, automatically enforced by the appellate courts. We dismissed these proposals on the grounds that employers who primarily seek to forestall their duty to bargain would invariably, through legal maneuvering, frustrate the best intentions of these proposals.

The proposal to enlarge the Board to seven members with seven-year appointments (while continuing to rely on three-member panels for much of the decisionmaking) has the best chance of the three reform bill provisions to expedite NLRB case handling. Here at least the speeding up of the process is dependent upon the Board's ability to efficiently manage a larger Board and not upon the imagination of defendants to circumvent new case handling procedures.

Based on our finding of the large negative impact of the delayed resolution of employer objections and challenges upon first-contract negotiations, it is recommended that objections and challenges be subject to court review just as are ULP complaints. This would obviate the need to reroute the resolution of employer objections and challenges through the technical refusal-to-bargain ULP complaint procedure. Those employers who want circuit court review of NLRB decisions would not be denied that review but at the same time would not be able to forestall their duty to bargain the additional months it now takes under the current resolution scheme. Furthermore, unions who receive unfavorable

Board decisions regarding objections and challenges would likewise be afforded (for the first time) the same right to court review.

An alternative policy would be to amend the NLRA to make it explicit that NLRB decisions regarding objections and challenges are not reviewable by the courts. Here we would eliminate any right of employers to technically refuse to bargain. This alternative would eliminate the long delays typically associated with circuit court decisionmaking.

One provision of the Labor Reform Bill required the Board to establish guidelines for providing make-whole remedies to entire work groups who were denied the benefit of union contracts during periods when employers refused to bargain in good faith. The purpose of providing make-whole remedies was to deter employers from bargaining in bad faith since if they did, they would still be compelled to retroactively compensate work units. The fundamental flaw in the proposal stems from the underlying assumption that unions ultimately obtain first contracts. That of course is a spurious assumption. Unless we are willing to dictate improved terms and conditions of employment for work units who never come under contract, the make-whole remedy can be seen as an additional incentive to deny first contracts altogether. Hence, we recommend against the make-whole proposal.

Finally, in chapter 4 we discuss proposals to reduce discriminatory discharges of union activists. Two proposals were developed in the Labor Reform Bill to deter employers from such illegal behavior. The first proposal was to increase the size of the present back pay award (i.e., lost earnings with mitigation). As a means of deterring illegal discharges and, in turn, improving the chances of unions to obtain first contracts, we conclude that even double back pay (without mitigation) would be insufficient. The problem with the proposal is twofold. First, even double back pay awards without

mitigation would be insufficiently costly in most circumstances to offset the expected long-run "gain" (i.e., keeping unions out of the workplace). The fact is that the price to the employer of a few well placed discharges is quite modest at best. The second problem is that unless the discharged employees are reinstated and the employer's vindictive behavior is thus rebuffed, larger back pay awards will not reduce the implied threat of further employer reprisals. In short, discharged employees must be reinstated, but as reported in chapter 2, only a minority ever are.

We can turn next to the heart of the problem—the need for quick reinstatement. Here we suggest turning to mandatory temporary court injunctions. Although the NLRB is given the discretion to seek temporary injunctions against discriminating employers under section 10(j) of the NLRA, it has failed to use this option except in a handful of cases. The 10(j) procedure is also inherently too slow to satisfy the need for reasonably quick reinstatements. It was proposed in the Labor Reform Bill that the Board be compelled under the automatic injunction provision of the NLRA [section 10(l)] to seek injunctions in discriminatory discharge cases. Of all the recommendations to thwart that minority of employers who stoop to discriminatory discharges in order to bust union organizing, this recommendation holds the greatest promise. However, we must modify the proposal to insure that a successful deterrent is developed. Besides the assurance of reinstatement, timeliness of reinstatement remains important. Even 10(l) injunctive relief takes considerable time. We estimated that it would take an average of 55 days from the date of discharge to secure a 10(l) injunction. This delay is likely to be sufficiently short in the case of first-contract negotiations, which typically take several months to obtain from employers who do bargain in good faith. But the 55-day delay is far too long in the case of winning representation rights in the first place. Employers can time discharges just prior to election day, insuring that key union activists are out of the way during crucial campaign

periods. To thwart this practice, the NLRB must establish a policy that elections lost by unions (where discharges have taken place) will be automatically rerun or in the more flagrant campaigns involving illegal discharges, the Board simply orders employers to recognize and bargain with unions. Before the election is rerun the discharged employees would be reinstated—a clear rebuff to the employer and a clear signal to other workers that the law will indeed protect them.By making certain that discharged employees are reinstated reasonably quickly and that lost elections accompanied by illegal discharges automatically result in rerun elections, the deterrent effect of 10(l) injunctions should come to light. Employers will simply have more to lose by discriminatorily discharging employees than from campaigning and negotiating fairly. The expected outcome, therefore, would be a sharp drop in discriminatory discharges. Hence, the greatest concern of the opponents of utilizing 10(l) injunctions (i.e., that the NLRB regional staff and district courts would be overwhelmed by a large and growing caseload) would be circumvented.

It is worth noting that none of our recommendations directly impede employers from surface bargaining or "going through the motions" during first-contract negotiations. Only the make-whole proposal, which we recommend against, directly got to the heart of this problem. Our recommendations, on the other hand, are expected to have a considerable indirect effect upon forcing recalcitrant employers to bargain in good faith. By expediting NLRB case handling and insuring that discrimination against union activists is halted, it is believed that union strength in negotiating first contracts will be enhanced substantially. It will be this enhanced bargaining power upon which unions will necessarily have to rely to economically force recalcitrant employers to fulfill their legal duty to bargain.

In conclusion, the research reported in this study began as an analysis of the factors that are associated with the failure of many unions to parlay union certification election vic-

tories into union-management agreements. Heretofore no such investigation and analysis has been forthcoming. Consequently, the substantial detrimental impact of several existing regulatory policies and procedures upon the rights of workers to union representation has not been systematically uncovered. In light of the findings of the present investigation, it is evident that labor law reform is greatly needed. Although we lack any historical evidence that the recommendations made will successfully impede that minority of employers who purposely seek to undermine our labor laws, it is believed that our policy recommendations hold sufficient promise to justify their implementation.

## NOTES

1. Reprinted in *Daily Labor Report,* No. 121, June 22, 1984. (Bureau of National Affairs, Inc.: Washington, DC), p. F-1.

2. Reprinted in *Daily Labor Report,* No. 123, June 26, 1984 (Bureau of National Affairs, Inc.: Washington, DC), p. F-1.

3. Reprinted in *Daily Labor Report,* No. 124, June 27, 1984 (Bureau of National Affairs, Inc.: Washington, DC), p. E-7.

# APPENDIX

## Indiana Sample Questionnaire

## Survey of First-Contract Negotiations

According to NLRB election files, won representation rights on in a certification election by employees of . Please answer to the best of your knowledge the questions below which pertain to negotiations following this victory.

1. When did contract negotiations begin? _____
2. Was a contract successfully negotiated? Yes ____ No ____ Still in negotiation ____
3. When was contract signed or negotiations dropped? _____
4. Was there an existing union contract with the above employer at the time of negotiations?

   Yes ____(with our union) Yes ____(with another union) No ____
5. Did representatives from the national union participate in negotiations? Yes ____ No ____
6. Did negotiations result in a strike? Yes ____ No ____
7. Was an outside mediator used at any time during negotiations?

   Yes ____ No ____
8. Did employer go out of business or permanently close the plant that employed workers in the certified unit?

   No ____ Yes ____(before contract signed) Yes ____(after contract signed)
9. What do you consider to the the greatest barrier(s) to negotiating the first contract?

   _____

   _____

   _____

   _____

10. Would you be willing to be interviewed about negotiations in general? Yes ____ No ____ Name _____ Phone _____

11. Would you like to receive a copy of the final report?

    Yes ____ No ____

To return, enclose survey in return envelope. Thank you again for your response.

**Nationwide Sample Questionnaire**

**Survey of First-Contract Negotiations**

According to NLRB election files, _____ won representation rights during _____ in a certification election by employees of _____, _____.

Please answer to the best of your knowledge the questions below which pertain to negotiations following this victory.

1. Was a contract successfully negotiated? Yes ____ No ____
   Still in negotiation ____
2. Approximately how long did it take to sign the contract or drop negotiations altogether? _____
3. Was there an existing union contract with the above employer at the time of negotiations?
   Yes ____(with our union) Yes ____(with another union) No ____
4. Did representatives from the national union participate in negotiations? Yes ____ No ____
5. Did negotiations result in a strike? Yes ____ No ____
6. Was an outside mediator used at any time during negotiations?
   Yes ____ No ____
7. Did employer use any outside management consultants for negotiations? Yes ____ No ____ Don't know ____
8. Did you file any unfair labor practice complaints against the employer? No ____ Yes ____
   If yes, please describe complaint and NLRB decisions.

   _____

   _____

9. Was a union security clause negotiated into the contract?
   Yes ____ No ____

10. What length of contract was negotiated? _____ years

11. Did employeer go out of business or permanently close the plant that employed workers in the certified unit?
    No ____ Yes ____(before contract signed) Yes ____(after contract signed)

12. What do you consider to be the greatest barrier(s) to negotiating the first contract? _____

    _____

13. What is the size of your local? ____ members ____ workers covered by contracts

14. Approximately how many non-managerial employees are employed by this employer at the facility where workers were organized?
    _____

To return, enclose survey in return envelope. Thank you again for your response.

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